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Supreme Court, U.S.
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No. 94-981

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court's articulation of over 40 instances of anecdotal evidence exemplifying discriminatory conduct in *Teamsters v. United States*, 431 U.S. 324 (1977), precludes discriminatory intent from being inferred from statistics alone in a disparate treatment case.

2. Whether in the absence of anecdotal evidence of timely job applications and job vacancies, the "inexorable zero" quote in *Teamsters v. United States*, 431 U.S. 324 (1977), overcomes the need for anecdotal evidence and permits statistics that fail to consider the employer's use of job qualifications, the interest of applicant's or the absence of the protected group in the applicant pool, to be a basis for a finding of illegal disparate treatment, and thereby creates a quota specifically forbidden by Title VII.

3. Whether the district court's ascertainment of an appropriate remedy may require an employer to advertise for prospective victims by suggesting they share in a "pot of gold" merely by presenting themselves as if they had known of past job openings.

4. Whether the Equal Access to Justice Act countenances a government defense of "substantial justification" in the face of clear knowledge prior to trial of an impossibility of success, in view of a clear pattern of employee hiring by the employer well in excess of the representation of the relevant protected group in the work force and in the absence of specific anecdotal evidence.

LIST OF PARTIES

Petitioner O & G Spring and Wire Forms Specialty Company is a closely-held, non-public corporation owned by Ted Grzeszkiewicz. O & G Spring and Wire Forms Specialty Company has no parent companies, subsidiaries or affiliates.

The Respondent here is:

The Equal Employment Opportunity Commission, an agency of the United States government.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

A. Procedural Background 4
B Statement of Facts 5
C The District Court Opinions 8
D. The Court of Appeals Decision 12

REASONS FOR GRANTING THE WRIT 14

I. INTRODUCTION 14

II. THE COURT MUST RESOLVE THE CONFLICT BETWEEN THE DISPARATE IMPACT AND TREATMENT MODELS OF PATTERN OR PRACTICE DISCRIMINATION AND AFFIRM THAT A DISPARATE TREATMENT CASE MUST INCORPORATE A FINDING OF MOTIVE OR INTENT TO DISCRIMINATE IN ORDER TO DIFFERENTIATE IT FROM THE DISPARATE IMPACT MODEL 15

A. A PATTERN OR PRACTICE CASE REQUIRES RELEVANT INDIVIDUAL TESTIMONY TO ESTABLISH DISCRIMINATION IS THE STANDARD EMPLOYMENT PRACTICE 18

B. THE GOVERNMENT MUST BEAR THE BURDEN OF EVALUATING ITS CASE AGAINST THE REASONABLENESS STANDARD AT ALL TIMES TO AVOID AN AWARD OF FEES AGAINST IT UNDER THE EQUAL ACCESS TO JUSTICE ACT 24

CONCLUSION 27

Appendix:

DECISION OF THE UNITED STATE COURT OF APPEALS 2a

FINDINGS OF FACT AND CONCLUSIONS OF LAW 39a
December 14, 1988, 705 F. Supp. 400 (N.D. Ill. 1988)

MEMORANDUM OPINION AND ORDER 57a
May 22, 1989, 52 F.E.P. Cas. (BNA) 1685 (N.D. Ill. 1989)

MEMORANDUM OPINION AND ORDER 60a
January 26, 1990, 732 F. Supp. 72 (N.D. Ill. 1990)

MEMORANDUM OPINION AND ORDER 66a
February 26, 1990, 52 F.E.P. Cas. (BNA) 1689 (N.D. Ill. 1990)

MEMORANDUM OPINION AND ORDER 70a
March 20, 1992, 790 F. Supp. 776 (N.D. Ill. 1992)

MEMORANDUM OPINION AND ORDER 78a
July 2, 1992, 1992 U.S. Dist LEXIS 10116 (N.D. Ill. 1992)

FINAL ORDER GRANTING RELIEF 81a
August 19, 1992

HEARING,
November 23, 1992 . . . . . 98a

TABLE OF AUTHORITIES

CASES

Page

Board of Trustees of Keene State College v. Sweeney,
439 U.S. 24 (1978) 17

Carter v. Ball,
33 F.3d 450 (4th Cir. 1994) 15, 17

Chisholm v. United States,
665 F.2d 482 (4th Cir. 1981) 20

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 19

Consolidated Serv. Systems,
989 F.2d at 233 23

Cooper v. Federal Reserve Bank,
467 U.S. 867 (1984) 20, 22

Craik v. Minnesota State Univ. Bd.,
731 F.2d 465 (8th Cir. 1984) 15, 19

EEOC v. Bailey Co.,
563 F.2d 439 (6th Cir. 1977) 22

EEOC v. Chicago Miniature Lamp Works,
947 F.2d 292 (7th Cir. 1991) 16, 19, 21

EEOC v. Consolidated Services Sys.
989 F.3d 233 (7th Cir. 1993) 20

EEOC v. Federal Reserve Bank,
698 F.2d 633 (4th Cir. 1983) 20

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 19

Furnco v. Waters,
438 U.S. 567 (1978) 23

General Telephone Co. v. Falcon,
457 U.S. 147 (1982) 20

Goff v. Continental Oil Co.,
678 F.2d 593 (5th Cir. 1982) 20

Hazelwood School Dist. v. United States,
433 U.S. 299 (1988) 19

Johnson v. Transportation Agency, Santa Clara Cty., Cal.,
480 U.S. 616 (1987) 15, 19

Marshall v. Airpax Electronics, Inc.,
595 F.2d 1043 (5th Cir. 1979) 16

Mayor of Phil. v. Educ. Equality League.,
415 U.S. 605 (1974) 19

Mazus v. Dept of Transp.,
629 F.2d 870 (3d Cir. 1980) 23

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 17

New York City Transit Auth. v. Beazer,
440 U.S. 568 (1979) 19

Parson v. Kaiser Alum. Chem. Corp.,
575 F.2d 1374 (5th Cir. 1978) 18

Payne v. Travenol Labs, Inc.,
673 F.2d 798 (5th Cir.) 18

Person v. J.S. Alberici Constr. Co.,
640 F.2d 916 (8th Cir. 1981) 18

Pierce v. F.R. Tripler & Co.,
955 F.2d 820 (2d Cir. 1992) 16

Pierce v. Underwood,
487 U.S. 552 (1988) 13, 26, 27

Spencer v. NLRB,
712 F.2d 539 (D.C. Cir. 1984) 24

St. Marys Honor Ctr. v. Hicks,
113 S. Ct. 2742 (1993) 14, 17

Ste Marie v. Eastern R. Ass'n,
650 F.2d 395 (2d Cir. 1981) 20

Teamsters v. United States,
431 U.S. 324 (1977) 14, 16, 18-22, 28

Texas Dept of Comm. Affairs v. Burdine,
450 U.S. 248 (1981) 17

United States v. Iron Workers, Local 86,
443 F.2d 544 (9th Cir.) 23

United States v. Lee Way Motor Freight, Inc.,
625 F.2d 918 (10th Cir. 1979) 21

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) 4, 10, 16, 17

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 9, 20

STATUTES

Age Discrimination in Employment Act (ADEA),
29 U.S.C. § 626 4

Civil Rights Act of 1964
42 U.S.C. §§ 2000e-2 . . . . . 2, 22
42 U.S.C. § 2000e-5(f) 4

Equal Access to Justice Act,
28 U.S.C. § 2412(d) 2, 3, 4, 27
28 U.S.C. § 24121(d)(1)(A) 3

LEGISLATIVE HISTORY

H.R. Rep. No. 99-120, 99th Cong., 1st Sess. (1985) 24

S. Rep. No. 98-586, 98th Cong., 2d Sess. 26

S. Rep. No. 98-586, 98th Cong., 2d. Sess. (1984) 25

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IN THE SUPREME COURT OF THE UNITED STATES

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner O & G Spring and Wire Forms Specialty Company ("O & G") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The divided opinion of the United States Court of Appeals for the Seventh Circuit is reported at 65 F.E.P Cas. (BNA) 1823 (7th Cir. 1994). The Memorandum Opinions and Orders of the United States District Court for the Northern District of Illinois, Eastern Division are reported at 705 F. Supp. 400 (N.D. Ill. 1988); 52 F.E.P. Cas. (BNA) 1685 (N.D. Ill. 1989); 732 F. Supp. 72 (N.D. Ill. 1990); 52 F.E.P. Cas. (BNA) 1689 (N.D. Ill. 1990); 790 F. Supp. 776 (N.D. Ill. 1992); 1992 U.S. Dist. LEXIS 10116 (N.D. Ill. 1992). These opinions and Orders are reproduced in the

appendix at pages 1a and 39a, 57a, 60a, 66a, 70a, and 78a, respectively.[1]

JURISDICTION

The decision of the United States Court of Appeals was entered on October 11, 1994. This Court has jurisdiction to review the judgment of that court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Civil Rights Act of 1964, as amended, ("Title VII"), 42 U.S.C. §§ 2000e-2(a) & (j), and the Equal Access to Justice Act, 28 U.S.C. § 2412(d), are involved in this case.

42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. § 2000e-2(j) provides:

> Nothing in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with

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[1] "_a" references are to the accompanying Appendix hereto. "Tr." references are to the pages of the trial court transcript.

> respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

28 U.S.C. § 24121(d)(1)(A), provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. §§ 2412(d)(1)(B), and (D), now provide that:

> (B) whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

> (D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

STATEMENT OF THE CASE

a. Procedural Background

On November 27, 1985, the Respondent Equal Employment Opportunity Commission ("EEOC") filed this action against Petitioner O & G. The complaint was brought under Section 706(f), 42 U.S.C. § 2000e-5(f) of Title VII, alleging that O & G had failed "to recruit and hire Black persons," Complaint ¶ 6, under disparate treatment and disparate impact models of discrimination and also for discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626. The single count complaint sought a remedy for five persons, including Walter Harris, "and others to be identified." Complaint ¶ 7.

After a bench trial, the trial court issued Findings of Fact and Conclusions of Law. 39-59a. That court found O&G not liable for age discrimination, but liable for disparate treatment and impact discrimination against blacks under Title VII. It later amended its findings in light of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and found that the EEOC had not proved discrimination on the basis of disparate impact. The court adhered to its finding that disparate treatment had been proved by the EEOC's statistics.

The district court also refused to award attorneys' fees to O & G as the prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), on the ADEA claim. 98a.

A divided Seventh Circuit panel, Judge Manion dissenting, affirmed. Jurisdiction in that court was pursuant to 28 U.S.C. § 1291 and Fed. R. App. Proc. 4(a)(1).

B. Statement of Facts

O & G is a small Chicago employer manufacturing wire spring products to custom order. It began as a start-up venture in 1966 by Ted Grzeszkiewicz, a Polish immigrant. 41a ¶ 7. O & G employs roughly fifty persons, 40-41a ¶¶ 6, 9, and hired 12 persons in 1983, 8 persons in 1984, and 6 persons in 1985.

As a "job shop," O & G's workforce fluctuates in size based upon the product orders actually received from customers. Tr. at 618. O & G hires in response to these orders and thus has limited hiring periods of 1-2 weeks averaging 6-7 times per year. It pays wages just above the minimum wage.

All hiring decisions follow personal interviews by Mr. Grzeszkiewicz. In over 90% of the cases, he hires persons with prior spring company or factory experience or with technical training. Tr. at 618. Applications are only considered for work if submitted within a two-week period prior to the need, because O & G does not have a personnel department and experience proved that consideration of applications beyond two-weeks resulted in finding these persons had already obtained work or had moved. 63a.

The employees of O & G fall within three categories. The secondary department (the only section at issue here), employs approximately 35 persons to do the finishing or "second" operations on the springs. The workers typically use punch or kick presses. Approximately ten skilled machinists form the wire. The skilled workers also include tool and die makers, and tool operators who design the tools and set up the machines for use by the secondary department workers. Finally, O & G has office and administrative staff of approximately five persons.

O & G employs a high percentage of Polish and Hispanic immigrants either trained in technical schools on machinery utilized

by O & G in their home countries or with prior spring company experience.

In October 1984, Walter Harris, a black male aged 54, allegedly went to O & G looking for a job.[2] He also observed younger people working at the plant and adduced that O & G did not hire older applicants. He filed a charge of discrimination with the EEOC on October 22, 1984.

At trial, the EEOC alleged that the majority of O & G's workers were "referred by friends or relatives," when the proof showed these categories contributed only 21% to O&G's workforce. Including employee referrals, the amount is boosted to only 28%.[3] The EEOC also alleged that the mere existence of substantial numbers of Poles and Hispanics in the O&G workforce proved discrimination existed. It did not prove whether these workers were referred by word of mouth into the applicant pool.[4]

Each of the five persons the EEOC identified in its Complaint as having been discriminated against were walk-ins off the street.[5]

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[2]The district court refused to make a finding whether Harris actually submitted an application to O&G. 58a.

[3]The evidence revealed 67% of O & G's applicants were from "off-the-street," 13% were referred by "relatives," 9% were referred by "friends," 7% were referred by certain named O&G employees, and 4% were referred from other sources.

[4]From 1984-87, there were a total of 22 applicants with Polish surnames, 26 Spanish, 8 Anglo, and 2 Black (race actually known). Def. Ex. 32.

[5]The first, Mike Kulak failed to appear for his deposition and did not testify at trial. The second person, Steve Nosko testified he did not know how to set O&G's machinery up. Deposition at 9. Nosko testified he did not file a discrimination charge with the EEOC, was not requested to lend his name to the EEOC complaint and has no idea how his name showed up in the case. Deposition at 9-10. The third person, Anthony George Guido had worked for O&G Spring at some time in the late 60's or 70's, in its shipping and receiving department.

(continued...)

Only one so testified, Walter Harris. Seven others testified for the EEOC: Mathis, tr. at 331, Godbold, tr, at 354, Ashford, tr. at 795, Brooks, tr. at 813, Lucas, tr. at 826, Bonner, tr. at 844, and Hassell, tr. at 856. Of these, Mathis, Godbold and Ashford applied during a period when O & G was not hiring (Aug. 20, 1985, Aug. 19, 1985, and Aug 20, 1985). None of these applications were within three weeks of an actual hire. Pl. Ex. 34. The remaining persons applied after December 31, 1985, the last day of the period that the EEOC sued for.

90% of O&G's applicants were *unemployed*. 47a ¶ 33; Tr. at 1530. The population statistics used by the EEOC's expert witness Dr. Pierre De Vise reflected blacks *actually employed* in the "operative" category of workers. The EEOC did not try to refine its data to the number of unemployed blacks with experience on machinery used by O&G or with technical training who would be in O&G's applicant pool. Tr. at 1511.

O&G also provided undisputed evidence that O&G's hires must finish expensive spring wire processed by O&G'S skilled workers (with high value added labor costs), must exercise judgment to

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[5](...continued)
Deposition at 4-5. Because of a heart condition, he only wanted light work, deposition at 16-17. The fourth person, Jan Makarewicz, had applied at O&G for a job, but took one elsewhere. Deposition at 13. His sole previous employment listed on his O&G application was as a security guard, deposition at 27, and the application shows he had only seven years of grammar school. Deposition at 26. Finally, Walter Harris, testified he applied at Zenith, Bethany, Pettibone, and Driscoll Plating Co. in 1981, but kept no records. Deposition at 11, 13, 17. He testified a black foreman at O&G's loading dock (with over ten years on the job at O&G), deposition at 25, told him O&G was hiring and that foreman promised him a job. Deposition at 19. That person, Eugene Campbell, testified that he encouraged Harris to apply for a job, but that Harris never did. Tr. at 1094-96. O&G Spring had no record of Harris' application for employment in 1984 in its entire file, which would have been kept in the normal course of business at the time the instant case was filed.

compare their finishing with the client's blueprints,[6] that low skilled workers can completely ruin the product, and that O&G cannot afford an internal training program, Tr. at 1549. The trial testimony proved that O & G applied a preference for experience in 90% of its hiring decisions, 47a ¶ 33; Tr. at 710, 1530, regardless of whether the job could be learned by unskilled labor, since experience was in fact O&G's standard. Tr. at 619, 1514, 1518-19.

C. The District Court's Opinions

The district court initially found that the EEOC had failed to establish O & G violated the ADEA. On the Title VII issues, the court issued several findings with regard to O & G's business practices. It found that Polish immigrants would be drawn to O & G "in excess" of their numbers in the work force, 49a ¶ 37; non-English speaking workers, both Poles and Hispanics, "would be more comfortable working for a company" that has a large number of Polish and Hispanic speaking employees," 49a ¶ 37; "it is reasonable to expect that recent immigrants would be willing to work at lower pay and under poorer conditions as an offset for comfort in the language setting," 49a ¶ 38; and it was reasonable for O & G to have "a preference for employees with experience or a technical background" because lack of a formal training program and need to "promote skilled persons from within rather than incur the expense of advertising for skilled employees," 49a ¶ 39.

The district court found, however, that O & G's use of referrals from within (by "word of mouth") had discriminated against blacks under the disparate impact model, because "no

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[6]Stamping or punch press operators included in the De Vise operative categories, do not exercise judgment or the use of drawings and blueprints because their machines are automated. Tr. at 1498. As Ted Grzeszkiewicz testified, his punch press operators require much skill, Tr. at 769, and the other operators must continually take measurements and read blueprints to keep quality up and costs down. Tr. at 718, 749, 751-54. The district court found O&G used prior experience or technical training as a substitute for formal training programs because it cannot afford to train on its manual kick press machines. Tr. at 1496; 49a ¶ 39.

explanation is sufficient to overcome the 'inexorable zero' " number of black hires during the period of 1979-85. 49a ¶ 40. "The explanations of O&G for this disparity partially but do not completely explain this numerical disparity. The court concludes that O&G has not explained away the 'inexorable zero.' " 55a ¶ 9.

The court also adopted the EEOC's conclusions of law verbatim, and ruled that the EEOC had established a disparate treatment case regarding "word of mouth" employee referrals, for in,

> the disparate treatment model the necessary degree of purposefulness or "intent" is inferred from the numbers. *See Watson v. Ft. Worth Bank & Trust, supra.* **This inference is compelled** *not* because Title VII requires a particular balance in an employer's work force or that the work force precisely "mirror" the composition of the relevant labor market but rather **because gross disparities between an employer's applicant flow, hiring or work force and its relevant labor market show the existence of discriminatory employment practices.**" App. at 10 ¶ 8. (emphasis added).

57-58a.

On January 29, 1990, the district court amended its previous orders in light of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and determined it had to reverse the disparate impact ruling: "a fair reading of the court's decision [Dec. 14, 1988] in this regard shows that the court felt that O & G had the burden of persuasion on this issue." 62a. It determined that:

> *O & G did establish legitimate business reasons* for recruiting workers for its unskilled positions by word of mouth. This practice provided O&G with a ready source of employees who would be willing to work at low pay and under the poor conditions that its jobs offered. Further, the Polish-born workers for the most part had received technical training in school in Poland that served O & G well in providing it with a supply of workers who

> could graduate to the more skilled positions without having to institute a formal training program or outside recruitment.

Id. (emphasis added).

The district court thereupon found that the EEOC failed to carry its burden of persuasion on the disparate impact count by not showing O&G had "a legitimate business purpose or that alternative means were available to achieve the same business ends with less racial impact," 62a, that the practice of hiring by word of mouth (used in 1/3 of O & G's hiring decisions) did not have a legitimate business purpose, or that alternate means of hiring could achieve less racial impact.

On the remaining disparate treatment count, the district court adhered to its previous view that "the EEOC's statistical evidence, while not perfect, nevertheless established a profound imbalance between the relevant market and O & G's hires." 64a. The district court asserted that: "O & G plainly and simply refused to hire blacks for the unskilled positions. The proof was in the statistical probabilities." *Id.* However, the district court decided in this Order, that O&G discriminated by not hiring "black walk-ins on the same basis as it had white walk-ins," rather than by word-of-mouth, 64-65a, a claim never offered by the EEOC.[7]

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[7]This case does not present a situation where there were no black applicants at all. As the district court found, black applicants comprised only 12.7% of total applications between 1983-85 and 17.5% from 1986-87. 42a ¶¶ 13, 14. At the same time, the EEOC's expert claimed the lowest availability rate to be 23%; O & G's expert asserted the rate was 10-15% from 1984-86. 45a ¶ 22. O & G demonstrated that the racial make-up of its neighborhood had begun changing in 1980. 47a ¶ 32. It also made an offer of proof by Father Ulatowski, the local priest, on the changing racial composition of the neighborhood, but the district court refused to hear it. Tr. at 1258-60. Moreover, as the district court noted, it is not unreasonable for immigrants to be drawn to O & G in numbers exceeding the work force at large and willing to work for low pay, in poor conditions, in order to enjoy the comfort of familiar language. 48-49a ¶¶ 37-39. The testimony also showed that many blacks selected themselves out after viewing O & G's harsh working conditions. Tr. at 1106, 1214, II-59-60. *See* Manion, J. at 25-26a & n.2.

On February 26, 1990, the district court entered a Memorandum Opinion and Order granting the EEOC leave to publish notice in several Chicago area newspapers to locate black persons who may have been discriminated against by O & G during the period 1979 to 1985. 66a. In that same Order, the district court denied O & G's own Motion that the publication of notice should follow a determination of entitlement to a potential remedy. O&G argued that the district court should first determine what the remedy in the case under Title VII should be, what the size of the monetary award, if any, to be imposed against O & G should be based upon the Court's then unresolved question of how many blacks O & G might have or should have statistically hired over the years,[8] and to what extent O & G, a small employer, could financially withstand an award.[9]

The district court considered O & G's request for attorneys' fees under the Equal Access to Justice Act The court agreed with O & G that in the ADEA portion of the case, the court had refused to accept the de Vise analysis comparing those *employed* in Cook County area over the age of 45 (ala "apples") with the persons O & G *hired* over 45 ("oranges"). 50a ¶ 45. At the EAJA fees hearing, the court stated to counsel for the EEOC: "I was amazed at the testimony....I didn't find him at all persuasive and neither did I find your evidence persuasive....[it] cast a pale light on all of his testimony" 99a. The court then denied the EAJA request. 100a.

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[8]O&G filed a Petition for Writ of Prohibition and/or Mandamus to review the publication order in the Seventh Circuit. Chief Judge Bauer entered a temporary stay of the District court's publication decision pending determination of the Petition on May 31, 1990. Case No. 90-2209. On July 3, 1990, the Court of Appeals denied the Petition.

[9]O & G has been forced to expend almost its entire net worth of $1,025,000.00 (1991) to defend itself in this case. To date, the record shows it has paid into escrow the $ 378,754.00 the district court adjudged in order to stay the mandate on appeal. The record also reflects that O & G has paid over $ 400,000.00 in attorneys' fees. It requested approximately $94,000.00 as the prevailing party in the EEOC's ADEA case.

A Final Order Granting Relief was entered on August 19, 1992, 81a, comprising a back pay award of $378,754.00, including prejudgment interest. 79-80a.

D. The Court of Appeals Decision

The court of appeals majority determined that under the disparate treatment model of discrimination, "in some cases, statistical disparities alone may prove intent." 5a. The appellate court answered O & G's argument that the statistics employed by the EEOC were unreliable because they did not address the fact that applicants self-selected themselves out to avoid O & G's harsh working conditions, failed to consider the prevalence of spoken foreign languages, did not adjust for low pay, and ignored O & G's legitimate business preference for persons with technical training or prior experience, 8a, by stating that the district court had "factored in O&G's preference for experienced workers, and still concluded that the disparity between the market and O&G's hires was too great."

Here, the court majority concluded that because the EEOC had also presented witnesses that "did not receive jobs," 9a n.8, the district court had not relied exclusively on statistical evidence. *Id.*

Accordingly, the majority concluded that although the district court "did err to the extent it implied that O&G was required to refute the EEOC evidence statistic-by-statistic, or offer evidence just as compelling as that presented by the EEOC," 9a, the court ruled that "*prima facie* statistical case presented by the EEOC was strong enough to overcome O&G's rebuttal by a preponderance of the evidence." 10a.

The court also concluded that the remedy of holding individualized hearings for 451 identified applicants was unreasonable, 12a, despite the fact that many of the responding persons had better jobs or were even imprisoned during the back pay period and therefore could never have applied.

Finally, the court denied O&G's request for attorneys's fees as the prevailing party in the ADEA and disparate impact cases, because under *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988), the EEOC had a reasonable basis in fact or law despite its expert's "severely flawed" statistics on the Age claim and that two letters by non-hiring personnel indicated the existence of a discriminatory policy that was later proven to be untrue. 20a.

In dissent, Judge Manion finds that the EEOC failed to establish disparate treatment, by its "failure to produce even one black witness who applied to fill a vacancy at O & G." 22a. He found the EEOC's case deficient on four grounds. First, that of the four witnesses to the EEOC's race case, they applied when O&G did not have openings in its secondary department. 23a. Second, the EEOC's statistical model failed to account for "qualified and interested" persons, in accordance with O&G's reasonable preference, 24a, and to account for the influence of non-English language fluency that would reduce interest in the English speaking labor market. 25-26a.

Finally, the dissent concludes that the "inexorable zero" statistical argument may work in large work forces, but in small ones as with O&G, it is an unreliable tool. 31a. He found the district court's allowance of fraudulent claimants, presented by the EEOC to receive compensation, created a "fraud on the court" that should not be allowed. 33a.

On the EAJA claim, Judge Manion would have awarded fees. Simply because the EEOC had retained an expert, and despite the district court's finding that the expert's age model was "so incredible that he called into question Dr. De Vise's credibility concerning his other testimony," 35a, it could not be reasonable for the EEOC to have pursued the Age claim beyond at least the point of the presentation of trial testimony that over 50% of O & G's workforce was over forty-five, whereas the figure was 37% at other facilities. 35a.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The principal issue in this Petition addresses whether a disparate treatment case can be established on statistics alone in the absent of relevant anecdotal evidence. This presents an important question of federal law that has not been decided and should be settled by this Court.

In *Teamsters v. United States*, 431 U.S. 324 (1977), the Court used language relied upon by the courts below that suggests in appropriate cases, statistics alone, especially those involving an "inexorable zero," may be sufficient to establish the disparate treatment case. Where over forty discrete instances of discrimination were revealed at trial in *Teamsters*, it appears that the Court's comments were not intended as authority to be applied in a situation where a small employer, whose applicant pool during its hiring periods failed to contain blacks, would cause the conversion of that discrepancy into a discrimination finding as a matter of law, where there is no evidence to show the employer tainted or tampered with applicant flow, as this Court recently concluded was the rule, in *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993). A discrete conflict in the circuits now exists. Here, the Seventh Circuit permits the use of no anecdotal evidence in pattern or practice disparate treatment cases whereas the Second, Fourth and Fifth Circuits have demanded at least twenty instances. *See* fn.12, *infra*.

A further question is presented as to the role statistics should play in these particular circumstances. As supported by the dissent of Judge Manion, the statistics presented by the EEOC here, were flawed because they failed to account for the legitimate hiring criteria utilized by O & G in over 90 per cent of its hiring decisions, *i.e.*, technical training or prior spring company experience, and failed to account for the lack of English fluency, especially where the practice claimed to be discriminatory was the benign act of considering applications from persons presenting applications for

employment walking in off-the-street. In spite of these legitimate business considerations, the Seventh Circuit has now approved use of the "inexorable zero" to find prima facie discrimination. This holding conflicts with *Carter v. Ball*, 33 F.3d 450, 457 (4th Cir. 1994), *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 494 (8th Cir. 1984) (Swygert, J., dissenting), and also *Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 656, (1987) (O'Connor, J., concurring), that the "inexorable zero" is not enough by itself to establish disparate treatment discrimination.

The final important question raised herein and not previously decided is the appropriate utilization of the "substantial justification" standard under the Equal Access to Justice Act. This case presents a glaring example of where as a result of an initial inquiry, the EEOC may have had reason to believe discrimination existed based upon age, but upon receiving all the facts in discovery before trial, it became clear that a pattern or practice of discrimination could not be supported because over 40 per cent of all hiring decisions made by O & G favored persons over forty years of age. Yet, the government put O & G to the substantial burden of defending itself on this claim. An objective standard in determining the meaning of "substantial justification" in light of the Congressional purposes explained, *infra*, should be addressed by the Court.

II.

THE COURT MUST RESOLVE THE CONFLICT BETWEEN THE DISPARATE IMPACT AND TREATMENT MODELS OF PATTERN OR PRACTICE DISCRIMINATION AND AFFIRM THAT A DISPARATE TREATMENT CASE MUST INCORPORATE A FINDING OF MOTIVE OR INTENT TO DISCRIMINATE IN ORDER TO DIFFERENTIATE IT FROM THE DISPARATE IMPACT MODEL.

This case presents the important circuit conflict whether an EEOC pattern or practice case alleging disparate treatment must include some evidence of individual discriminatory treatment.

The court of appeals below affirmed a finding of disparate treatment discrimination by Petitioner O&G due to the lack of presence of blacks in its workforce. Relying upon this Court's decision in *Teamsters v. United States*, 431 U.S. 324 (1977), the court of appeals concluded that a sufficient case of treatment discrimination can be established upon statistical evidence alone and that in any event, the EEOC presented persons who applied and did not receive jobs, although the evidence showed each of the EEOC's witnesses had applied at times when O&G did not have a vacancy. Until now, a vacant position had to be available to support a claim. *See Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 824 (2d Cir. 1992); *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 304 (7th Cir. 1991); *Marshall v. Airpax Electronics, Inc.*, 595 F.2d 1043, 1044 (5th Cir. 1979) ("no job opening at the time of the interview").

Until the enactment and revision of Title VII by the Civil Rights Act of 1991, it had been observed by the courts that the two models of proving discrimination available under Title VII attempted proof in two ways, the first by showing an imbalance in statistics, and the second, by proving intent, "the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters*, 431 U.S. at 335 n.15. Here, there is no "smoking gun" evidence.

In *Wards Cove v. Atonio*, 490 U.S. 642 (1989), this Court distinguished the two discrimination models and held that in a disparate impact case, the plaintiff must identify the particular employment practice it alleges causes the imbalance, then the defendant responds by producing a business justification for the practice, and lastly, the plaintiff may then show pretext or alternate practices can achieve a neutral result. *Id.* at 656, 659. Importantly, the Court compared this shifting burden-of-proof mechanism to,

> Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration.

Wards Cove, 490 U.S. at 660.

This holding conforms to the Court's recent decision in *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), where the Court reexplained the shifting burdens of proof in disparate treatment cases and that the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), presumption placed "upon the defendant the burden of producing an explanation to rebut the prima facie case—*i.e.*, the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate nondiscriminatory reason.' " *St. Mary's*, 113 S. Ct. at 2747, quoting *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

Yet, the Court's purpose in *St Mary's* was to establish that Title VII requires that a verdict must stand upon discrimination *vel non*, and not just upon the trier of fact's rejection of the employer's production of evidence as the true reason for the employment decision. Once the defendant produces evidence of any nondiscriminatory reason, then " ' the presumption raised by the prima facie case is rebutted,' *Burdine*, 450 U.S. 255, 101 S. Ct., at 1094-1095, and 'drops from the case.' " *St Mary's*, 113 S. Ct. at 2747.

However, the court below concluded that the district court's subsequent weighing of the evidence permitted it to conclude that the "EEOC had proven its case. The district court flagged the bottom line in the case: the 'inexorable zero.' " 10a. This announcement brings the Seventh Circuit to a conclusion that conflicts with *Teamsters*, wherein intent and motive are the cornerstones of the disparate treatment model and with *Wards Cove*, that employment action was not based on legitimate neutral factors. *Also Bd. of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978). Furthermore, the decision conflicts with *Carter v. Ball*, 33 F.3d 450, 457 (4th Cir. 1994), that held "zero...is not enough to constitute a *prima facie* case of discrimination."

A. A PATTERN OR PRACTICE CASE REQUIRES RELEVANT INDIVIDUAL TESTIMONY TO ESTABLISH DISCRIMINATION IS THE STANDARD EMPLOYMENT PRACTICE

Before the district court, O & G proved legitimate business reasons for its employment practices that the district court found reasonable and upheld against the EEOC's disparate impact claim in the case. 49a, 62a. As *Wards Cove* demonstrates, the same legitimate business considerations are applicable in a treatment case and must be rebutted by the plaintiff to prevail. The Seventh Circuit's pronouncement that questionable statistics can drive a treatment finding conflicts with the decisions of this Court, *Teamsters*, 461 U.S. at 360 n.46 (pattern and practice case rebutted by showing statistics inaccurate or insufficient or by providing "a non-discriminatory explanation for the apparently discriminatory result") and other circuits. *Payne v. Travenol Labs, Inc.*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Person v. J.S. Alberici Constr. Co.*, 640 F.2d 916, 919 (8th Cir. 1981) (statistics insufficient to establish pretext); *Parson v. Kaiser Alum. Chem. Corp.*, 575 F.2d 1374, 1383-84 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979).[10]

The statistical evidence provided by the EEOC's expert, Dr. de Vise, failed to account for qualified and interested persons in the jobs O & G had available. For O & G, this meant persons who could read blueprints, operate punch and stamp presses, and be promoted to skilled work. Because the district court found these conditions reasonable and legitimate employment requirements for O & G, 62a, the failure of the EEOC to account for these variables in its statistics undermines the EEOC's suggested imbalance of

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[10]Certainly, O&G provided nondiscriminatory reasons why its workforce resulted in a high ethnic-minority composition that the district court found were reasonable. Disparate impact cases "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity....Proof of discriminatory motive, we have held, is not required under a disparate-impact theory." *Teamsters*, 431 U.S. at 335 n.15. Impliedly, the identification of a discriminatory motive or intent is required in a treatment case.

blacks in the workforce. "[T]his is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded." *Mayor of Phil. v. Educ. Equality League.*, 415 U.S. 605, 620 (1974). As in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 502 (1989), we still do "not even know how many [blacks] in the relevant labor market are qualified."[11] *See* 24-25a (Manion, J.) (dissenting). As Judge Manion recognizes:

> But every zero is not "inexorable." *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 494 (8th Cir. 1984) (Swygert, J., dissenting). *See, e.g., Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 656, 94 L.Ed. 2d 615, 107 S. Ct. 1442 (1987) (O'Connor, J., concurring) (no discrimination in fact existed even though there were no women in skilled craft positions). To say otherwise would go against Congress' caution to "employers not to engage in hiring quotas...." *Chicago Miniature*, 947 F.2d at 296 (quoting 42 U.S.C. § 2000(e)--2).

31a.

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[11]The failure to account for O&G's business need for persons with skills who can move up vitiates the EEOC's market flow numbers. "[W]here special qualifications are necessary, the relevant labor pool...must be the number qualified to undertake the particular tasks." *City of Richmond v. Crosan*, 488 U.S. at 501-02 (1989) (explaining *United States v. Teamsters*); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1988). Although the Court indicated in *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 773 (1976), and in *Teamsters*, 431 U.S. at 360, that a class action pattern or practice case does not address whether actual victims exist, the concept is incompatible with the *Teamsters* holding that a significant number of individuals ("some 40 employees," in *Teamsters*, 431 U.S. at 352) in both cases were specifically presented. Otherwise, a quota in contravention of Title VII is formed by the EEOC simply by its calling a case a pattern or practice. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 586 (1979) (statistical imbalance "figure is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons;" citing *Teamsters*, 431 U.S. at 340 n.20). Since the Title VII inquiry is whether the defendant intentionally discriminated, some evidence is necessary to lend credence to the claim.

It seems implausible that the statistics the district court rejected in dismissing the disparate impact case against O & G assume a new life in a treatment case. If the Court's pronouncement that resulting quotas and preferential treatment are not the purpose of Title VII, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 & 994 n.2 (1988), this is the case that proves "the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, "*id.* at 2787, is to adopt a quota, as that is all the courts below looked at, *viz.*, the generalized statistical imbalance. This Court's cases do not support the newfound thesis that Title VII also prohibits abstract discrimination rather than specific employment practices. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 158 (1982).

Specifically in *Teamsters*, 431 U.S. at 236 n.16, the Court explained that a pattern or practice case requires more than "isolated acts of discrimination by a single business," and in fact, there T.I.M.E.-D.C., Inc. had 6,472 employees and had hired hundreds of workers during the period. *Id.* at 341 n.21. Furthermore, the "Government bolstered its statistical case with the testimony of individuals who recounted over 40 specific instances of discrimination," 431 U.S. at 338. Yet, the Court was careful to explain that statistics may be used "where it reached proportions comparable to those in this case," *id.* at 339, and "[c]onsiderations such as small sample size may, of course, detract from the value of such evidence." *Id.* at 339 n.20.[12]

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[12]In *Cooper v. Federal Reserve Bank*, 467 U.S. at 879-80 & n.11 (1984), this Court affirmatively agreed that the presentation of only a few instances ("two or three") of discrimination did not establish a general employment policy and noted with approval the decisions in *Chisholm v. United States*, 665 F.2d 482, 495 (4th Cir. 1981), where twenty class members testified; *Ste Marie v. Eastern R. Ass'n*, 650 F.2d 395, 406 (2d Cir. 1981), where seven individual acts were insufficient; *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 643-44 (4th Cir. 1983), where three to seven incidents was insufficient; and *Goff v. Continental Oil Co.*, 678 F.2d 593, 597 (5th Cir. 1982), where three witness accounts even if true, was insufficient to establish a pattern or practice. In O & G, the EEOC presented four witnesses to prove the disparate race claims. *See EEOC v. Consolidated Services Sys.*, 989 F.3d 233, 237 (7th Cir. 1993) (Commission presents four witnesses, a "sorry parade").

Teamsters reiterated the burden on the government to produce substantial evidence: in a pattern or practice case, the government submits the existence of a procedure that is the regular practice of the employer and the employer "defeat[s] the prima facie showing of a pattern or practice by demonstrating that the Government's proof is inaccurate or insignificant" or there are "too few employment decisions." 431 U.S. at 360.[13] But in each of these articulations of the pattern of proof in *Teamsters*, the Court never digressed from the requirement that the prima facie burden of proof requires that the minority group member "had unsuccessfully sought a job for which there is a vacancy," 431 U.S. at 238.

In fact, the Court repeatedly shows that the *McDonnell Douglas* formulation "does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the *two most common legitimate reasons* on which an employer might rely to reject a job applicant: *an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.*" *Id.* at 358 n.44 (emphasis added). At bar, the unrefuted record from the application's on hand is that none of the EEOC's witnesses applied at a time in which a job vacancy arose. *See EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 304 (7th Cir. 1991) (that blacks applied and were not hired is "simply unpersuasive...without further evidence of intent.").[14]

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[13]*See United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 930 (10th Cir. 1979) (observing that "extensive, specific and pervasive violations" form the foundation of the pattern or practice case).

[14]In pattern and practice cases, the Court's decisions indicate that at a remedy phase an employer will be presented the opportunity to contest each person who files a claim on his or her availability and qualification, as provided in *Teamsters*, 431 U.S. at 360 & n.45, 369 n.53. Moreover, it appears that the Seventh Circuit erred in allowing the EEOC's remedy to stand on a scheme of broad class relief without establishing the requirements set out in *Teamsters*, 431 U.S. at 362, that "an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of proved discrimination. As in *Franks*, the burden then rests on the employer to demonstrate that the individual was denied an employment opportunity for lawful reasons." Nonapplicants, "must be given the opportunity

(continued...)

Inasmuch as the loss of a class representative's discriminatory treatment case may cause the loss of class claims, *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 878 2801 (1984), it should be equally clear that a pattern or practice case brought by the Government similarly cannot stand upon the shoulders of witnesses who were not treated discriminatorily.[15] In *Teamsters*, "[t]he individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life." With O & G, the EEOC could not establish any policy, motive, intent, or the application of discrimination to any witness. "[R]easons related to available

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[14](...continued)
to undertake the difficult task of proving that they should be treated" the same as applicants. *Id.* at 364. This "requires two distinct determinations: that he would have applied but for discrimination and that he would have been discriminatorily rejected had he applied." *Id.* at 368 n.52.

This is a totally impractical solution for a small employer to undertake. Were O & G required to screen the "claimants," the cost of doing so is more onerous than just paying the award. The twin phases make sense only if the government presents a pattern or practice case with a substantial number of victims as part of its case in chief. But its basis is erroneous where the small employer elects not to select out claimants because of the sheer magnitude of the cost, here there are 421 claimants; any effort by O & G to challenge them is an illusory right, as it is more expensive and time consuming than paying the judgement. *See* fn. 9, *supra*. An employer's failure to contest, however, ***undermines*** the entire concept of "statistics only" pattern or practice cases, as without selecting out "victims," the Court permits the establishment of the very quota liability in contravention of Title VII, 42 U.S.C. § 2000e-2(j), decried by the Court in *Watson*, *supra*.

The problems inherent in the program permitted by the Seventh Circuit against O & G are as Judge Manion recounts, they are like the "jump-ons and ghost riders" universally denounced by the public. 33a n.8. Payouts to these persons subverts the equitable underpinning of Title VII and deprives real victims of compensation. Because the EEOC regularly requests these notices and courts deny individual hearings, *see EEOC v. Chicago Miniature Lamp Works*, 668 F. Supp. 1150 (N.D. Ill. 1987), these orders escape appellate review and should be reviewed. *Super Tire Engr. Co. v. McCorkle*, 416 U.S. 115, 125 (1974).

[15]The EEOC is limited to asserting as discriminatory acts those the charging party had standing to assert. *EEOC v. Bailey Co.*, 563 F.2d 439, 446, 50-51 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof." *Id.* at 359 n. 45. Here, this relevant evidence was applied to every EEOC witness and ignored.[16]

This case presents an egregious situation that repeatedly compels numerous small business immigrant owners to defend themselves from EEOC statistical cases simply because they tend to draw applicants from their immigrant communities in excess of statistical representation in the population. *Cf.* 47a ¶¶ 31, 37. As the court in *Consolidated Serv. Systems*, 989 F.2d at 233, observed:

> It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring. There is equal danger to small black-run business in our central cities. Must such businesses undertake in the name of nondiscrimination costly measures to recruit nonblack employees?

This Court may not need to answer that question, but this case and others like *Consolidated* represent a pernicious use by the federal government of police power in situations where intent to discriminate cannot be demonstrated. The Petition should be granted to confirm that liability based upon the mere existence of a statistical disparity in a workforce, without specific intent to discriminate, is but the government's illegal compulsion of quotas.

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[16]Instances of individual discriminatory treatment is intended to bolster the case of pattern or practice litigation. *Mazus v. Dep't of Transp.*, 629 F.2d 870, 875 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (comparisons "must be between comparable groups and free from variables which would undermine the reasonableness of discrimination inferences to be drawn."); *United States v. Iron Workers, Local 86*, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (statistics must be based on "the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn."). In *Furnco v. Waters*, 438 U.S. 567, 577-78 (1978), this Court carefully stated that the purpose of Title VII is not to have the employer "consider the *most* employment applications....it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."

B. THE GOVERNMENT MUST BEAR THE BURDEN OF EVALUATING ITS CASE AGAINST THE REASONABLENESS STANDARD AT ALL TIMES TO AVOID AN AWARD OF FEES AGAINST IT UNDER THE EQUAL ACCESS TO JUSTICE ACT

This case presents a critically unresolved issue under the Equal Access to Justice Act ("EAJA") that requires this Court's supervisory interdiction. Under the Court of Appeals' rendition, the Government no longer bears the duty to scrutinize its case as it proceeds against a private party.

Of all the changes made by Congress in the reauthorization of the EAJA, none is more clear than that the holding of *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1984), is rejected. The Congressional reports are succinct on this point:

> Part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act. Some courts have construed the "position of the United States" which must be "substantially justified" in a narrow fashion which has helped the Federal Government escape liability for awards. H.R. 2378 clarifies both points. When the escape clause was originally written, it was understood that "position of the United States" was not limited to the government's litigation position but included the action—including agency action—which led to the litigation. However, courts have been divided on the meaning of "position of the United States." H.R. 2378 clarifies that the broader meaning applies.

H.R. Rep. No. 99-120, 99th Cong., 1st Sess., at 9 (1985).

Furthermore,

> In clarifying the "position" term, the Committee expressly rejects the holding of the District of Columbia Circuit in *Spencer v. NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984), that the only government "position" to be scrutinized in the context of

> an EAJA case is that taken in the litigation itself. This restrictive view, adopted by several other courts of appeal has resulted in the denial of a number of meritorious fee claims, because it fails to focus attention on the unjustified government activity that formed the basis of the litigation.

Id. at 12 (citing *Tyler Business Services v. NLRB*, 695 F.2d 73, 75 (4th Cir. 1982).

The Senate Report on S. 919, S. Rep. No. 98-586, 98th Cong., 2d. Sess. (1984), is replete with references to *Spencer* and the conflicting decision of the Third Circuit in *Natural Resources Defense Council v. EPA*, 703 F.2d 700 (3d Cir. 1983). The Third Circuit opinion was adopted as the correct view. As for the *Spencer* view,

> Finally, it is suggested that virtual automatic fee-shifting will result under the bill's "position" view, when agency action is overturned by a court under a "deferential" (arbitrary and capricious) standard of review. *In such a case, however, a private party has actually corrected a government wrongdoing and the government's lawyers by himself; he has "re-defined the limits of Federal authority"* H. Rep. No. 1418, 96th Cong. 2d Sess. (1980) at 10. It would mock the purposes of the EAJA to make this party additionally pay the legal bill on behalf of the Government.

Id. at 11 (emphasis added).

Here, merely because the EEOC was able to retain an expert to provide what the district court called: "amazing" testimony, the EEOC will escape responsibility for putting this small employer to task. The panel majority cites no cases to support its proposition. *See* 20a. Judge Manion in dissent, proves that if the government's litigation position is not substantially justified, an EAJA award is proper. 34a.

The EAJA, as noted *supra*, is intended to compensate private parties for formulating public policy by challenging federal government action. The premise of the statute "is to reduce the deterrents (thus assuring) that administrative decisions reflect informed deliberation." S. Rep. No. 98-586, 98th Cong., 2d Sess. at 10 (1984) *citing to* H. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980).

> The primary concern of Congress in enacting the EAJA was to provide an incentive for parties, aggrieved by unreasonable governmental action, to undertake litigation to vindicate their rights, as well as to deter arbitrary or unjustified agency action. The legislative history of the EAJA is replete with references to administrative abuses which Congress sought to limit through enactment of an attorney fee-shifting device. *NRDC*, 703 F. 2d at 714 (Thompson, J. concurring); *see e.g.*, where a small businessman spent $3,000 to successfully contest a $25 fine from OSHA; another who spent $30,000 in legal fees to beat back a Labor Department demand for $54,000 in back pay. Cong. Rec. S. 13690 daily ed., Sept. 26, 1980 (statement of Mr. DeConcini).

Id. at 9.

In *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541 (1988), the Court applied the Act to the award of fees "if either the government's prelitigation conduct or its litigation position are not substantially justified." The fundamental flaw in the appellate court majority's conclusion is that the EAJA does not apply where the defect does not render the "government's position untenable." 21a. In the instant case, it is not that the EEOC's witnesses were unqualified or that the district court weighed the credibility of witnesses (a point O & G repeatedly asked the district court to do, but was refused, 58a), but that EAJA sets a continuing burden on the government to evaluate its case. At the point in time of trial, the EEOC knew full well that the statistics on the ADEA claim Dr. de Vise was about to present were insupportable; the district court called it "amazing," and it "cast a pale" on all Dr. de Vise's testim-

ony. 99-100a. If it was discernable to the trial judge, it should have been discernable to the EEOC. Yet, the EEOC pushed O & G into a costly full defense on this issue.

Here, the record "commands the conclusion" that the district court applied the wrong standard under the EAJA, for although the appellate court articulated the grounds upon which the district court could have granted or withheld the relief, the EAJA specifically states the discretion is to be exercised by the "court." 28 U.S.C. § 2412(d)(1)(A); *Pierce*, 108 S. Ct. at 2547. Unless this Court grants review, the EAJA will again become unwound by the district courts' penchant to favor the government.

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: November 30, 1994

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-3436 & 92-4118

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 9966.–Harry D. Leinenweber, Judge.

November 2, 1993, Argued–October 11, 1994, Decided

Before WOOD, JR., CUDAHY, and MANION, Circuit Judges.

CUDAHY, *Circuit Judge*. O & G Spring and Wire Forms Specialty Company (O&G) is a small company on Chicago's West Side that manufactures springs and specialty wire forms to order. The shop has about 50 workers, about 35 of whom work at low-skilled jobs in the "secondary department" operating kick and punch presses. O&G recruited for these positions by word-of-mouth and by accepting applications from walk-ins off the street, although walk-ins were only considered during certain hiring "windows." From 1979 until 1985, O&G hired 87 people for the secondary department, 58 of whom were walk-in applicants. None of the 87 hires were African-Americans. On November 27, 1985, the Equal Employment Opportunity Commission (EEOC) filed a

complaint charging O&G with engaging in a pattern and practice of racial and age discrimination in recruiting and hiring in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a) (1988), and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* (1988).[17] After a bench trial and subsequent amended opinions, the district court found that O&G had engaged in a pattern of intentional discrimination against African-Americans. 705 F. Supp. 400 (N.D. Ill. 1988).

I. *Background*

The EEOC alleged that, from 1979 until 1985, O&G intentionally discriminated against African-Americans and persons over age 40 in recruitment and hiring for the secondary department, and also that O&G's word-of-mouth recruiting technique had a disparate impact on African-Americans and workers over 40.[18] At trial, the EEOC presented evidence that African-Americans represented the largest group in the walk-in pool during the relevant time period, although O&G claimed that these individuals did not request applications. Four African-American witnesses also provided anecdotal evidence that they had been rejected for jobs at O&G.[19]

But the heart of the case was the statistical evidence presented by both parties to calculate how many African-Americans should

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[17]In the two years after the EEOC filed its complaint, O&G hired 12 new people in the secondary department, 5 of them African-Americans. O&G attributes the increase to demographic changes in the neighborhood, claiming that in 1985 the neighborhood "switched" from Polish to African-American. O&G also claims that the opening of a nearby market attracted African-Americans and increased foot traffic past O&G.

[18]The age discrimination claims are only relevant to the cross-appeal on attorneys' fees, and the merits of the case will be discussed below.

[19]O&G claims that none of these witnesses applied during a "hiring window" and therefore their testimony is irrelevant. The district court made no finding on this matter, but did explicitly credit the EEOC's anecdotal evidence. 732 F. Supp. 72, 75 (N.D. Ill. 1990).

have been hired based on the relevant labor market serving O&G. The EEOC expert, Dr. Pierre de Vise, concluded that African--American availability in the relevant labor market ranged from 22.5 percent to 31 percent. Dr. de Vise opined that these figures probably underestimated the African-American availability, since they excluded unemployed people, and African-Americans were over-represented among the unemployed. O&G's expert, Dr. Glen Meyers, testified that Dr. de Vise's determinations of African--American availability were inaccurate. Dr. Meyers testified that Dr. de Vise failed to consider O&G's preference for skilled machinists as workers or workers' own self-selection. Dr. Meyers also testified that O&G had legitimate business justifications for relying on word-of-mouth and walk-in recruiting and hiring.

The district court found O&G liable for violations of Title VII on both the intentional discrimination and disparate impact claims, but found O&G not liable on the ADEA claim. The district court agreed with O&G that it was reasonable to expect that O&G's work force might be disproportionately composed of recent immigrants, and reasonable for O&G to prefer experienced applicants. 705 F. Supp. at 406. But even so, the district court concluded that "no explanation is sufficient to overcome the 'inexorable zero' employment of blacks at O&G from 1979 though 1985." *Id*. African-American availability in the relevant labor market would have to be extremely low--6 percent--to account for no African-American hires and, even if the relevant market had never been precisely defined, the EEOC had proven that availability was in fact significantly higher. *Id*. The district court amended its decision on May 22, 1989 to clarify its findings.

On January 26, 1990 the district court reconsidered its decision in light of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989), and held that the disparate impact claim failed since the EEOC had not proven that O&G's word-of-mouth recruiting served no legitimate business purpose. 732 F. Supp. 72 (N.D. Ill. 1990). Focusing only on O&G's walk--in hiring, the district court reaffirmed its decision that O&G was liable for intentional discrimination. The district court again

reconsidered its decision on March 20, 1992 after this court decided *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292 (7th Cir. 1991), in which we reversed a lower court's finding of intentional discrimination because the EEOC had not offered sufficient proof of intent. The district court found the two cases dissimilar, and found no reason to disturb its prior finding.[20] In later proceedings, the district court awarded back pay to be paid pro rata to a class of applicants or would-be applicants to O&G. 790 F. Supp. 776 (N.D. Ill. 1992). O&G appeals the district court's finding of liability on the Title VII claim, and the denial of its motion for attorneys' fees for the ADEA claim.

II. *Sufficiency of evidence*

O&G contends that there was insufficient evidence for the district court to find that it engaged in a pattern and practice of intentional discrimination, arguing primarily that statistical evidence alone cannot prove intentional discrimination. The district court squarely held the opposite, noting that "it is beyond cavil that statistical proof alone is sufficient to establish liability under both the disparate treatment and disparate impact of models." 705 F. Supp. at 408 (emphasis in original). O&G's arguments to the contrary have been firmly rejected by the Supreme Court and this circuit. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20, 52 L.Ed. 2d 396, 97 S. Ct. 1843 (1977) ("Since the passage of the Civil Rights Act of 1964, the courts have

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[20]In *Chicago Miniature*, we found that the EEOC's definition of the relevant labor market was flawed in significant respects. In particular, the geographic scope was defined too broadly and failed to account for the effect that commuting time might have on available labor. Also, the district court completely ignored language factors that might have skewed the applicant pool. Recognizing the heavy burden on a defendant to show that a district court's findings were clearly erroneous, we nonetheless found that in that case the statistics were too unreliable about important variables. 947 F.2d at 301. Although the *Chicago Miniature* analysis is useful here, the key facts of these two cases are different. Not only were the EEOC's calculations of the relevant labor market far more refined in this case, but the district court took account of language and other variables when evaluating the statistics.

frequently relied upon statistical evidence to prove a violation . . . in many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer."); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, 53 L.Ed. 2d 768, 97 S. Ct. 2736 (1977); *Chicago Miniature*, 947 F.2d at 299 ("Statistical evidence of disparities between minority representation in an employer's work force and minority representation in the community from which employees are hired can prove disparate treatment in a pattern and practice case."); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988). Reliance on statistical evidence by no means diminishes the plaintiff's obligation to prove discriminatory intent—but in some cases, statistical disparities alone may prove intent. "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters*, 431 U.S. at 339-40 n.20.[21] Appropriate statistical evidence can also be sufficient to establish a pattern and practice of discrimination—or in other words, that the alleged discriminatory hiring practices were "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters*, 431 U.S. at 336; *Hazelwood*, 433 U.S. at 308.

But, of course, statistics, like any evidence, are not irrefutable; strong statistics may prove a case on their own, while shaky statistics may be insufficient unless accompanied by additional

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[21]This long line of cases was not weakened, as O&G suggests, by our recent decision in *EEOC v. Consolidated Service Sys.*, 989 F.2d 233 (7th Cir. 1993). There, we affirmed a district court's finding that a small company had not engaged in intentional discrimination with its word-of-mouth hiring policy. The court specifically affirmed the potentially "decisive" value of statistical evidence, noting that "Consolidated had some non-Korean applicants for employment, and if it had never hired any this would support, perhaps decisively, an inference of discrimination." *Id.* at 236-37.

evidence. *Teamsters*, 431 U.S. at 340; *Chicago Miniature*, 947 F.2d at 300-01. O&G maintains that the EEOC's statistical evidence was fatally flawed in several respects. Determining the validity and value of statistical evidence is firmly within the discretion of the district court, and we will reverse its findings only if they are clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-90, 72 L.Ed.2d 66, 102 S. Ct. 1781 (1982). In this respect, "a statistical model [in a discrimination case] need not be completely specified and some arguably relevant variables can be omitted in certain cases." *Chicago Miniature*, 947 F.2d at 300; *Bazemore v. Friday*, 478 U.S. 385, 400, 92 L.Ed. 2d 315, 106 S. Ct. 3000 (1986).

Determining the relevant labor market is an essential step in determining whether there are any statistically significant deviations between the market and the employer's hiring patterns. *Chicago Miniature*, 947 F.2d at 299-300. The EEOC's expert Dr. de Vise provided three different formulations of O&G's relevant labor market, each with a slightly different geographic or occupational scope.[22] The district court did not choose among the three models, but found that they presented a sufficiently accurate range against which the district court could evaluate O&G's hiring record. Under

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[22]If the relevant labor market were defined as punching and stamping press machine operators in the City of Chicago (the narrowest of the relevant occupational and geographic categories in the 1980 census), then African American availability for hire would be 22.5 percent. Under the broader occupational category for "machine operators, assemblers and inspectors," but with a more narrowly focused geographic category based on considering O&G's applicants within a 5-mile radius, the African-American availability would be 23.1 percent. Under a third analysis, Dr. de Vise looked to employers' EEO-1 reporting forms that show the yearly African-American participation rate from 1980-85 of "operatives," defined as operators of "machine or processing equipment" or "other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training." In O&G's 60651 zip code, the availability of African-American operatives would be 31.8 percent. *Cf. Hazelwood*, 433 U.S. at 309, n.14 (standard deviations greater than 2 are statistically significant); *Castaneda v. Partida*, 430 U.S. 482, 497 n.17, 51 L. Ed. 2d 498, 97 S. Ct. 1272 (1977) (statistics for lawyers).

the most conservative definition, African-American availability was at least 22.5 percent. The district court found that "the statistical probability using standard deviation analysis of no black hires during the period 1979 through 1985 was infinitesimal." 732 F. Supp. at 74.

O&G argues that the EEOC statistics do not account for applicant self-selection. Selection bias on the part of the participants in the otherwise-relevant labor market can, of course, account for disparities in the number of people who walk by a shop and the number who walk in. *See Chicago Miniature*, 947 F.2d at 302, and cases cited therein. But the district court did factor in O&G's claim that its relevant labor market would be disproportionately composed of recent Polish immigrants, since O&G offered poor working conditions and low pay, but, as a compensating factor, did not require English. 705 F. Supp. at 406; *see also* 790 F. Supp. at 779 (district court noted that it considered the language factor). Even this, however, could not account for the absence of any African--American hires, particularly in light of testimony from O&G staff and application data indicating that African-Americans represented about 20 percent of the walk-in applicant pool. 732 F. Supp. at 74. Moreover, O&G incorrectly states (and the dissent repeats several times) that the district court found that African-Americans preferred not to work at O&G because its workers spoke Polish or Spanish. Not surprisingly, no such finding of language-based selection bias on the part of African-Americans--nor any shred of evidence that would support such a finding--exists in the record. The dissent's conclusion that the presence of Polish and Spanish speakers at O&G would, on its own, drive away African-Americans is entirely unfounded, and suggests ethnic attitudes without support in the evidence. It would certainly be improper to impute such biases on appeal. In any event, to make such a variable meaningful, O&G would have to show that African-Americans exhibited this preference in significantly greater proportion to other native-born English speakers. The district court thus considered applicant self-selection, but concluded that, to the extent it was a valid factor, it did not significantly reduce the statistical disparities.

O&G's expert also testified that, as a small company, O&G could not afford to train new hires, and thus needed to hire experienced workers. The district court disagreed that jobs in the secondary department required experience, but found that it would be a desirable qualification. O&G contends that the EEOC statistics ignore this preference for skilled workers.[23] The EEOC statistics were based upon three occupational categories—punch and stamp press operators, machine operators in general and operators--that O&G's own expert conceded were appropriate. This situation contrasts, for example, with the analysis this court found unpersuasive in *Chicago Miniature*, in which the EEOC presented only a simplistic analysis based on race and the entire Chicago region. 947 F.2d at 301. In any event, even though O&G's work does not require high skill, O&G still argues that these occupational categories included too many unskilled workers. But the district court factored in O&G's preference for experienced workers, and still concluded that the disparity between the market and O&G's hires was too great. The district court also considered O&G's argument that it usually hired unemployed workers, and that the EEOC statistics considered only skilled employed workers. This factor could cut in different ways, since the EEOC presented evidence that African-American unemployment was higher than white unemployment. In the end, O&G's failure to hire African Americans would only be justified in statistical terms if African-American availability were 6 percent of the labor market—or was discounted by a factor of nearly three from the most conservative EEOC estimate in this case.

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[23]The district court found such a preference reasonable, although the parties still dispute just how much of a role experience played in O&G's hiring decisions. O&G contended that almost half of its secondary department employees had previous technical training, Tr. 710, 1530, and most of the others had general factory experience, while the EEOC asserted that most of O&G's hires were unskilled and O&G vice president Joseph Olinyk had testified that jobs in the secondary department were "unskilled" and that an inexperienced person could learn how to operate the machines in an hour. Tr. 210.

The district court thoroughly weighed all of the objections raised here and in the dissent against the EEOC's statistical evidence. The district court candidly pointed out the areas that were not mathematically provable. But even the use of the most forgiving variables could not reduce the calculation of African-Americans in the relevant labor market to a level that would account statistically for O&G's failure to hire any African-Americans. These are precisely the sort of determinations that we review carefully but will not disturb unless we are convinced the district court has erred. And O&G fails to note that the district court did not rely exclusively on the statistical evidence, but considered it in tandem with the EEOC's anecdotal evidence. We are led to the same conclusion as the Court in *Teamsters* that "in any event, fine tuning of the statistics could not have obscured the glaring absence of minorities . . . . The company's inability to rebut the inference of discrimination comes not from a measure of statistics but from 'the inexorable zero.'" *Teamsters*, 431 U.S. at 342 n.23.[24]

III. *Burden of proof*

O&G also argues that it was subject to an erroneously high burden of proof. O&G relies on numerous statements in which the district court pointed out that O&G's evidence was insufficient to outweigh the EEOC's evidence of intentional discrimination. The district court did err to the extent that it implied that O&G was required to refute the EEOC evidence statistic-by-statistic, or offer evidence just as compelling as that presented by the EEOC. Instead, the employer in a disparate treatment case may refute the

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[24]We reach the same conclusion with respect to O&G's contention that the EEOC did not adequately prove a "pattern or practice" of discrimination. The EEOC was required to prove a "regular, purposeful, less-favorable treatment of a protected group," *King v. General Electric Co.*, 960 F.2d 617, 623 (7th Cir. 1992); in other words, that discriminatory hiring was the standard operating procedure. *Teamsters*, 431 U.S. at 336. Statistics may prove such a pattern, *id.*, and here they clearly did. The EEOC presented witnesses who testified that they did not receive jobs; the district court credited this testimony (importantly, unlike the district court in *Consolidated*).

EEOC's evidence by showing that it is inaccurate or insignificant. *Sears*, 839 F.2d at 308. There was never any question about whether O&G met any intermediate burdens of production. Addressing O&G's complaints about burden-shifting, the district court noted "the net result was not that O&G's attempt to rebut was legally insufficient. This does not shift the burden of proof to O&G; it only means that the prima facie statistical case presented by EEOC was strong enough to overcome O&G's rebuttal by a preponderance of the evidence." Order of May 22, 1989.

And in any event, after a full trial on the merits, the intermediate burdens are of no consequence: we look only to whether "the plaintiffs have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination." *Bazemore*, 478 U.S. at 398; *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16, 75 L.Ed. 2d 403, 103 S. Ct. 1478 (1983); *Hybert v. Hearst*, 900 F.2d 1050, 1054 (7th Cir. 1990). O&G contends that the district court nonetheless placed an erroneously high ultimate burden of proof on O&G. Although the district court initially believed that O&G carried a burden of persuasion, the district court recognized this error and reevaluated the evidence in its January 26, 1990 decision following *Wards Cove*. The district court recognized that the EEOC carried the burden of persuasion, *cf. St. Mary's Honor Center v. Hicks*, 125 L.Ed. 2d 407, 113 S. Ct. 2742 (1993), and weighed the evidence accordingly. O&G points to numerous occasions on which the district court weighed the evidence as examples of an allegedly improper shift in the burden of persuasion. But if this equation held true, any weighing of evidence would reflect an improper shift of the burden of proof, and the district court apparently could never rely on deficiencies in a defendant's proof. In our view, the district court did not improperly shift any burden to O&G, but properly concluded that the EEOC had proven its case. The district court flagged the bottom line in the case: the "inexorable zero." In light of the findings that there was significant African-American participation in O&G's relevant labor market, the

district court did not err in concluding that the EEOC had proven its case by a preponderance of the evidence.

IV. *Remedy*

Before deciding on the remedy, the district court granted the EEOC leave to publish notice seeking to identify victims of O&G's discrimination so that the court could fashion an appropriate method of awarding back pay. O&G objected to publication, arguing that the court should first determine whether back pay ought to be awarded, and if so, for what period of time and in what amount. But the district court determined that it needed to know the number of claimants from the outset to give it an idea whether individualized remedies would be feasible, or whether classwide relief was in order. *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied*, 433 U.S. 919, 53 L.Ed. 2d 1105, 97 S. Ct. 2995 (1977); *Chicago Miniature*, 947 F.2d at 300.

The EEOC published a notice addressed to African-Americans who applied or would have applied to O&G for low-skilled jobs from 1979 until 1985. Four hundred and fifty claimants responded. On appeal, O&G argues that the district court should not have allowed the EEOC to publish a class notice before determining the other elements of an appropriate remedy. O&G contends that the notice might reach too broadly and would generate too many false claims to entitlement to relief. But O&G does not claim that such an approach was unlawful or constituted an abuse of the district court's equitable powers to fashion a remedy, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-21, 45 L.Ed. 2d 280, 95 S. Ct. 2362 (1975). O&G does not request reversal or a remand on this point, but only reimbursement for its expenses and fees "associated with the remedy phase." But, if the court did not abuse its discretion, we will not reject its choice of remedy. O&G points to no error, and given the district court's wide discretion to fashion a Title VII remedy, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763, 47 L.Ed. 2d 444, 96 S. Ct. 1251 (1976), we do not conclude that the district court abused its discretion by first determining the size of the class and then proceeding to fashion the remedy.

The district court then determined that O&G owed $ 378,754 in back pay, including benefits and prejudgment interest.[25] The $378,754 would be paid pro rata to all eligible class members. For the next four years, O&G also would be required to fill its new positions with at least equal numbers of class members and non-class members. O&G argues that the district court should not have

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[25]To reach this figure, the court first determined O&G's hiring shortfall, or the number of African-Americans O&G would have hired absent discrimination. Since one-third of new hires were recruited by word-of-mouth, and at the beginning of the period in 1979 all secondary department employees were white, at first most word-of-mouth recruits would also have been white. But the walk-in applicants would be expected to mirror the makeup of the relevant labor market (as the applicant data shows that it did). Since O&G hired 58 walk-ins out of a labor market that at the most conservative estimate was 22.5 percent African-American, 13 hires should have been African-Americans (58 x 22.5 percent). As the African-American presence in O&G's work force increased through non-discriminatory walk-in hiring, however, it would be expected that more African Americans would be recruited by word-of-mouth, as occurred in 1986-87. Thus if African-Americans had been hired at a uniform rate in 1979-1985, an average of 6.5 African-Americans would have been employed at O&G at any one time, constituting 14 percent of its work force. Assuming that 14 percent of the 29 people hired by word-of-mouth from 1979 to 1985 were African-American, 4 of the word-of-mouth hires should have been African-American. O&G's total hiring shortfall was therefore 17 (13+4).

The district court then determined the back pay award by multiplying the value of wages and fringe benefits actually earned by the 87 hires from 1979 to 1985 by the African-American hiring shortfall percentage (17 out of 87). This number was offset by the amount that those rejected by O&G earned or could have earned in other jobs during the period. § 706(g), 42 U.S.C. § 2000e-5(g). To hold individualized hearings for 451 applicants to determine what they had earned when they were not employed at O&G would have been unreasonable; moreover, given that O&G's jobs were entry level jobs requiring little experience, it would be impossible to determine which specific class members would have been hired absent discrimination. The court determined that interim wages could be determined by presuming that the employment rate among African-American applicants or would-be applicants to O&G mirrored the African-American employment rate in the relevant labor market. The parties agreed that 22 percent of African-Americans in the relevant market were unemployed. In sum, the back pay award was determined by multiplying the total wages and benefits of the 87 hires times O&G's African-American shortfall percentage (17 out of 87) times 22 percent.

awarded back pay but should have considered alternatives such as establishment of an affirmative action program. But back pay is presumptively appropriate in a Title VII case. *Albemarle*, 422 U.S. at 421; *Horn v. Duke Homes*, 755 F.2d 599, 606 (7th Cir. 1985). It may only be denied for reasons which "if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole." *Albemarle*, 422 U.S. at 421. If, for example, the back pay award would bankrupt O&G and render it judgment-proof, it might be within the district court's discretion to alter the award. But here, the district court concluded that O&G could afford to pay the entire judgment, a conclusion O&G does not dispute on appeal.

O&G also argues that the district court improperly extended the back pay period. But the court only calculated back pay due from October 22, 1982 (two years before the filing of a charge with the Commission, as required by 42 U.S.C. § 2000e-5(g)); *see also Patterson v. Youngstown Sheet & Tube Co.*, 659 F.2d 736, 740 (7th Cir.), *cert. denied*, 454 U.S. 1100, 70 L.Ed. 2d 641, 102 S. Ct. 674 (1981). The district court included in its calculations individuals who had applied to O&G as early as 1979, since they might still have been employed in 1982. But these individuals could recover only for back pay lost after 1982, not from the date of hire. The district court was clearly entitled to include all victims in the remedy and properly limited recovery in accordance with the two year limitation of Title VII. 42 U.S.C. § 2000e-5(g).

V. *Attorneys' fees*

In its December 14, 1988 ruling, the district court found in favor of O&G on the ADEA claim. O&G moved for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (1988). After a hearing, the district court denied the motion from the bench on November 23, 1992, finding that the EEOC's position was substantially justified. O&G appeals. The EEOC argues that the EAJA's substantial justification standard, 28 U.S.C. § 2412(d), does not apply to an ADEA case, but that even if it does, the EEOC's position was substantially justified. The question

of what statute applies has not been squarely addressed in this circuit, so we first consider whether the EAJA applies, and if so, whether the district court erred in denying O&G attorneys' fees.

A.

Under the American rule, parties generally bear their own costs unless Congress specifically provides otherwise. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247, 44 L.Ed. 2d 141, 95 S. Ct. 1612 (1975). But, prior to passage of the EAJA in 1980, even where fee-shifting statutes allowed for costs, the federal government retained its common law immunity from suit unless the fee-shifting statute or some other statute explicitly allowed recovery from the United States (such as Title II of the Civil Rights Act, 42 U.S.C. § 2000a-3(b)). 28 U.S.C. § 2412 (1975); *Alyeska*, 421 U.S. at 265-67. The EAJA significantly overhauled § 2412 to allow for recovery against the federal government. Section 2412(b) waived the government's immunity from suit and provided that the United States would be liable for fees under the common law to the same extent as any other party. Section 2412(d) carved out an exception to the common law for most litigants, as defined in § 2412(d)(2)(B), holding the government to a higher standard:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

As the text makes clear, the EAJA is a default provision, and does not apply if another statute specifically provides for fees in the same situation as described in § 2412(d). For example, the EAJA does not apply to suits under Title VII. *EEOC v. Consolidated Services Sys.*, 30 F.3d 58 (7th Cir. 1994); *EEOC v. Kimbrough*

Investment Co., 703 F.2d 98, 103 (5th Cir. 1983). Under Title VII, prevailing defendants may recover fees only if the EEOC's suit was frivolous. 42 U.S.C. § 2000e-5(k) ("the Commission and the United States shall be liable for costs [including attorney's fees] the same as a private person"); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 54 L.Ed. 2d 648, 98 S. Ct. 694 (1978) (awarding fees to prevailing Title VII defendants only if suit was frivolous).

The EEOC argues that EAJA § 2412(d) (the substantial justification standard) likewise does not apply to suits brought under the ADEA. Since the ADEA requires the court to award fees to a prevailing plaintiff but does not provide for recovery for prevailing defendants, argues the EEOC, a defendant may only recover under the common-law "bad faith" exception to the American rule, applied to the federal government by EAJA § 2412(b).

From a policy standpoint, the EEOC's argument that the ADEA should be interpreted like Title VII with respect to fees makes some sense. The ADEA and Title VII share the same goal--elimination of discrimination in the workplace--and their substantive prohibitions are identical. *Lorillard v. Pons*, 434 U.S. 575, 584, 55 L.Ed. 2d 40, 98 S. Ct. 866 (1978). Thus cases construing Title VII are often persuasive authority when interpreting the ADEA. *Hayden v. La-Z-Boy Chair Co.*, 9 F.3d 617, 619 (7th Cir. 1993), *cert. denied*, 128 L.Ed. 2d 47, 114 S. Ct. 1371 (1994); *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 581 (7th Cir. 1993); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 83 L.Ed. 2d 523, 105 S. Ct. 613 (1985); *Lehman v. Nakshian*, 453 U.S. 156, 163-64, 69 L.Ed. 2d 548, 101 S. Ct. 2698 (1981). And the Supreme Court has consistently made clear that the fee-shifting provisions of the Civil Rights Act are integrally linked to advancing the substantive goal of eradication of discrimination--a goal shared by the ADEA. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02, 19 L.Ed. 2d 1263, 88 S. Ct. 964 (1968) (Title II); *Albemarle*, 422 U.S. at 415 (Title VII). These substantive goals underlie Title VII's differential treatment of prevailing plaintiffs and prevailing defendants. *Christiansburg*, 434

U.S. 412, 54 L.Ed. 2d 648, 98 S. Ct. 694; *Fogerty v. Fantasy, Inc.*, 127 L.Ed. 2d 455, 114 S. Ct. 1023, 1028 (1994). The Court's reasoning applies equally to the ADEA: "The plaintiff is the chosen instrument of Congress to vindicate a 'policy that Congress considered the highest priority . . . [and] when a district court awards fees to a prevailing plaintiff, it is awarding them against a violator of federal law . . . these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant." *Christiansburg*, 434 U.S. at 418-19. The Supreme Court has recently underscored that it is appropriate to consider the policies animating a fee-shifting statute when interpreting similar statutes. *Fogerty*, 114 S. Ct. at 1028; *see also Stomper v. Amalgamated Transit Union Local 241*, 27 F.3d 316, 320 (7th Cir. 1994) (Cudahy, J., dissenting). We might therefore expect the ADEA, so substantively similar to Title VII, to follow a similar fee-shifting regime. *See Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402 (7th Cir. 1989), *aff'd*, 494 U.S. 820, 108 L.Ed. 2d 834, 110 S. Ct. 1566 (1990) (ADEA fee-shifting provision interpreted like Title VII); *Heiar v. Crawford County, Was.*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027, 87 L.Ed. 2d 631, 105 S. Ct. 3500 (1985) (ADEA fee-shifting provisions interpreted like 42 U.S.C. § 1988); *but see Stomper* (counseling against drawing inferences from Title VII or § 1988).

But although Congress intended the ADEA to mirror Title VII in—substance, it very explicitly adopted a different remedial schemea modified version of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 301 et seq. *Lorillard*, 434 U.S. at 578-79; 29 U.S.C. § 626(b).[26] Section 7(b) of the ADEA incorporates by reference the

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[26]Although other statutes have adopted the language of the FLSA fee-shifting provision, *see Stomper*, 27 F.3d at 318 n.1, for some examples, the ADEA is notably explicit in its incorporation of FLSA's entire remedial scheme. The legislative history of the ADEA makes quite clear that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard*, 434 U.S. at 581. Senator Javits, who proposed applying FLSA to age discrimination and was a floor

FLSA fee-shifting provision, which provides "the court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant." 29 U.S.C. § 216(b); 29 U.S.C. § 626(b). Although § 216(b) makes clear that the allowance of fees to a prevailing plaintiff is mandatory, *Alyeska*, 421 U.S. at 261 n.34, what of prevailing defendants? Either § 216(b) prohibits awarding fees to a prevailing defendant—which would preclude application of the EAJA—or it is silent on the matter—which means the EAJA or the common law steps in to fill the void. The language of the provision, with its emphasis on an award "to the plaintiffs" to be paid "by the defendants," strongly suggests by negative implication that it precludes awarding fees to a prevailing defendant. The ADEA, unlike the FLSA, was enacted against the backdrop of Title VII under which defendants may recover fees; the absence of any provision in the ADEA allowing for an award to defendants is worthy of note. Some courts have suggested, although somewhat ambiguously, that the FLSA might preclude awarding fees to a prevailing defendant. *See Alyeska*, 421 U.S. at 264 n.37 ("Congress . . . has in some instances provided that either party could be given an award depending upon the outcome of the litigation and the court's discretion . . . while in others it has specified that only one of the litigants can be awarded fees. See . . . Fair Labor Standards Act, 29 U.S.C. § 216(b)."); *Christiansburg*, 434 U.S. at 415-16 n.5 (contrasting FLSA, which provides for a mandatory award to prevailing plaintiffs, with statutes that allow permissive awards to one party, or awards to either party); *see also Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763, 767 (9th Cir. 1984) (prevailing defendants may not recover fees under ADEA); *Mizrany v. Texas Rehabilitation Comm'n*, 522 F. Supp. 611 (S.D. Tex. 1981), *aff'd*, 685 F.2d 1384 (5th Cir. 1982)

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manager of the bill, made this explicit: "The enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact, [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]." 113 Cong. Rec. 31254 (1967), quoted in *Lorillard*, 434 U.S. at 582. *See also Fogerty*, 127 L. Ed. 2d 455, 114 S. Ct. 1023 (noting that ADEA expressly incorporated FLSA provisions; refusing to presume similar congressional intent for statute where legislative history was less clear).

(same). The *Christiansburg* Court, rejecting the EEOC's argument that Title VII defendants could only recover attorneys' fees under the bad faith exception (the same argument the EEOC pursues here), noted that no statutory provision would have been necessary if Congress had intended this default rule to apply. 434 U.S. at 419. But the Court also remarked "had Congress provided for attorney's fees awards only to successful plaintiffs, an argument could have been made that the congressional action had pre-empted the common-law rule, and that, therefore, a successful defendant could not recover attorney's fees even against a plaintiff who had proceeded in bad faith." *Id.* at 419 n.13.

But the negative implication of § 216(b) does not persuasively evince a Congressional intent to preclude application of the common law rule allowing recovery if a plaintiff acted in bad faith. *Cf. Sullivan v. Hudson*, 490 U.S. 877, 891-92, 104 L.Ed. 2d 941, 109 S. Ct. 2248 (1989) (refusing to read provision of EAJA awarding fees following "adversary adjudication" to preclude recovery of fees following non-adversary adjudication); *Krodel v. Young*, 576 F. Supp. 390, 393 (D.D.C. 1983) (congressional intent must be clear, although statute need not use words "attorneys fees"). Congress must be presumed to know, upon incorporating the FLSA into the ADEA, that in the absence of a specific provision, prevailing defendants would not be able to recover fees absent a showing of bad faith. By explicitly changing this rule with respect to plaintiffs but remaining silent with respect to defendants, the most sensible reading is that the FLSA and the ADEA adopt the common law rule with respect to prevailing defendants. We have already reached this conclusion about the FLSA. *EEOC v. Kenosha Unified School Dist. No. 1*, 620 F.2d 1220 (7th Cir. 1984) (attorneys' fees only available to prevailing defendant under FLSA under bad faith exception to American rule); *see also Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1219 (1985), overruled on other grounds, 846 F.2d 457 (7th Cir. 1988) (ADEA does not expressly preclude awarding costs to prevailing defendants under Fed. R. Civ. P. 54(d)). Several courts are in accord. *See, e.g., Cova v. Coca-Cola*, 574 F.2d 958, 962 (8th Cir. 1978) (prevailing defendants under ADEA subject to American rule); *Gray v. New England Telephone & Telegraph Co.*,

792 F.2d 251, 260 (1st Cir. 1986) (same); *Morgan v. Union Metal Mfg.*, 757 F.2d 792, 796 (6th Cir. 1985) (same); *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1542-43 (11th Cir. 1985) (American rule applies to FLSA); *EEOC v. Clay Printing*, 13 F.3d 813 (4th Cir. 1994) (EAJA applies to ADEA prevailing defendant); *Donovan v. Dialamerica Marketing Co.*, 757 F.2d 1376, 1388-89 (3d Cir. 1985), *cert. denied*, 474 U.S. 919, 88 L.Ed. 2d 255, 106 S. Ct. 246 (no discussion of § 216(b), but applying EAJA to prevailing FLSA defendant); *Steinberg v. St. Regis*, 583 F. Supp. 421, 424-25 (S.D.N.Y. 1984); *Riley v. Resthaven Gardens of Memory*, No. 90-1227-C, 1991 U.S. Dist. LEXIS 17804 (D. Kan. Nov. 12, 1984).

Prior to enactment of the EAJA, private employers could recover attorneys' fees under the FLSA if the plaintiff's allegations were frivolous or in bad faith, but the EEOC was immune. *Kenosha Unified School Dist.*, 620 F.2d at 1228. With the passage of the EAJA this immunity has vanished, and the EEOC is liable under 28 U.S.C. § 2412(b) just as a private plaintiff is liable under common law. But while the EEOC concedes that EAJA § 2412(b) (the bad faith standard) applies to the ADEA, it maintains that the ADEA preempts application of § 2412(d) (the substantial justification standard). This distinction is untenable. The ADEA either preempts application of EAJA § 2412 or it does not. We have held that it does not, and thus nothing precludes application of all of § 2412, including the substantial justification standard of § 2412(d). *Accord EEOC v. Clay Printing Co.*, 13 F.3d 813.

B.

O&G is therefore entitled to attorneys' fees unless the court finds that the EEOC's position in the litigation was substantially justified, or that special circumstances would make an award unjust. 28 U.S.C. § 2412(d)(1)(A). The parties argue at some length about the precise meaning of "substantially justified." Obviously it requires a stronger showing than mere good faith, but does not require a showing that the government's position was either correct or even "justified to a high degree." Instead, the position must be

"justified . . . in the main—that is, justified to a degree that could satisfy a reasonable person . . . . [A] position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565-66 & n.2, 101 L.Ed. 2d 490, 108 S. Ct. 2541 (1988). The district court reviewed the EEOC's evidence in the litigation, and ruled that O&G was not entitled to fees. We cannot disturb this ruling unless the record "commands the conclusion" that the district court was wrong. *Id.* at 570-71. Although the district court, ruling from the bench, did not facilitate review by clearly setting forth its reasoning, we cannot conclude that it abused its discretion by denying O&G attorneys' fees.

At trial, the EEOC expert Dr. de Vise testified that O&G had hired only about half as many workers older than 40 than would be expected based on the relevant labor market. The district court found that Dr. de Vise's analysis was severely flawed, comparing the age of new hires with the age of already employed workers in the relevant market. Under the proper analysis, O&G's work force included even more older workers than would be expected based on the relevant market. But the EEOC had offered additional evidence to support its claim. Three people testified that they were over 45 and qualified to work at O&G, but had been rejected. The EEOC also introduced two letters written to the EEOC. The first letter was written by O&G's attorney and stated "many of our machines do require a younger person because of the extensive effort required to operate the machines and move the necessary parts." The second letter, written by O&G controller Richard Gregg, stated "because of these demanding aspects of secondary work, we prefer to hire younger males between 20-45 years old." The EEOC argues that these letters alone, but certainly in conjunction with the other evidence, indicate that the EEOC had a reasonable basis for pursuing the ADEA claim.

O&G vigorously contests the probative value of this evidence. With respect to the statistical evidence, O&G points to the district court's statements at the fees hearing indicating that it found the

EEOC's statistical case on the age claim extremely weak. But the district court, clearly aware of the weaknesses in the EEOC's statistical case, did not conclude that the weakness rendered the government's position untenable. O&G also claims that the anecdotal witnesses were not in fact qualified for work at O&G. But weighing the credibility of these witnesses was decidedly within the district court's prerogative. Although the district court made no specific findings about this testimony, it does not appear to be significantly different from the anecdotal evidence the district court credited on the racial discrimination claim.

Lastly, O&G argues that the letters to the EEOC were repudiated by other testimony, and thus were an insufficient basis for the EEOC to proceed to trial. But the evidence may not have been as thoroughly discredited as O&G contends: although O&G's attorney testified that he had no personal knowledge of O&G's hiring preferences and that his letter had merely repeated what Gregg stated, Gregg admitted that he had approved both letters and written his own before he was aware that age discrimination was prohibited by law. Tr. 537, 509. O&G also contends that the EEOC knew before trial that O&G had in fact hired a sufficient number of workers to eliminate any statistical disparity. But again, the weight to be given such a factor, if true, is within the province of the district court. Moreover, the evidence must be evaluated as a whole, and on the basis of all of the evidence, we cannot conclude that the district court erred when it determined that the EEOC was justified in bringing its case. We therefore will not disturb the decision to deny attorneys' fees.

VI.

We think it a rather dangerous suggestion of the dissent that recent immigrants, by clinging to their native tongues, somehow repel other minority applicants and, in effect, deprive them of normal consideration under the discrimination laws. For the reasons given above, the decisions of the district court are AFFIRMED.

MANION, *Circuit Judge*, dissenting. I find this case particularly disturbing. The Equal Employment Opportunity Commission ("EEOC") has a duty to intercede on behalf of vulnerable victims of unwarranted discrimination. But here the EEOC seems to have gone way over the line, especially in the age discrimination claim and the monetary remedy. For the reasons that follow I must respectfully dissent.

I. Disparate Treatment Claim

Ted Gryezkiewicz migrated to America from Communist Poland. In 1966 or 1967 he began his pursuit of the American dream by founding O & G Spring and Wire Forms Specialty Company ("O & G"), a company which manufactures wire spring products. His entrepreneurial efforts have been reasonably successful. O & G now employs roughly fifty people at its Chicago plant, and the company is modestly profitable. For the last ten years, O & G has been defending itself from complaints by the EEOC. His defense, in attorney's fees alone, has already cost him more than $ 400,000. Today, this court holds that O & G must pay some 451 persons "who might have applied to O & G" more than $ 378,000 in back pay. The court found discrimination because his thirty-five secondary department employees included Hispanic and Polish workers, but no black workers. The court reached this result notwithstanding the EEOC's failure to produce even one black witness who applied to fill a vacancy at O & G. There was only a faulty statistical model presented by the EEOC for the purposes of litigation.

A. *Sufficiency of the Evidence*

This court concludes that there was sufficient evidence for the district court to find against O & G on the EEOC's disparate treatment claim. "To succeed in a claim alleging disparate treatment, the EEOC ultimately had the burden of proving by a preponderance of the evidence that [O & G] engaged in a 'pattern or practice' of discrimination. . . ." *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 308 (7th Cir. 1988). "This includes proof

of the employer's discriminatory intent. . . ." *Id.* The EEOC must also prove a "pattern or practice"--in other words " ' that racial discrimination was the company's standard operating procedure--the regular rather than the unusual practice.' " *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1050-51 (7th Cir. 1991) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 52 L.Ed. 2d 396, 97 S. Ct. 1843 (1977)). The district court found intentional discrimination on the basis of statistical evidence and so-called "anecdotal" evidence. This court concludes that this evidence was sufficient to support the district court's finding of intentional discrimination. I disagree.

First, a look at the so-called anecdotal evidence: This evidence consisted of testimony by four black witnesses who applied to O & G and were not hired. A court may rely on evidence of individual acts of intentional discrimination to prove disparate treatment. *See Sears*, 839 F.2d at 308. But in this case the testimony of the four black witnesses was insufficient to demonstrate that any individual discrimination had occurred because the EEOC did not prove that O & G had openings in its secondary department when the four applied. *E.E.O.C. v. Chicago Miniature Lamp Works*, 947 F.2d 292, 304 (7th Cir. 1991) (evidence that the black applicants were not hired in itself was unpersuasive to show intentional discrimination). *See also Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 824 (2d Cir. 1992) (in order to be liable for discrimination, a position must be available). "If there is no vacancy to be filled, . . . that would normally be the end of a Title VII claim." *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1118 (7th Cir. 1992). The district court did not find that any of the black witnesses had applied for vacant positions at O & G. O & G asserts that no vacancies existed and the EEOC does not dispute this fact in its brief. Instead, the EEOC asserts that the percentage of blacks applying when O & G was hiring would be the same as the percentage of whites. This fact, however, has no bearing on whether vacancies existed when the people applied. Without a finding that a "vacancy" existed, the testimony of these witnesses cannot be considered anecdotal evidence of individual acts of discrimination by O & G. *See, e.g.*,

Sears, 839 F.2d at 310, n.8; *Chicago Miniature*, 947 F.2d 292; *Pierce*, 955 F.2d 820.[1]

The only remaining evidence supporting the EEOC's position consists of a statistical model presented by Dr. de Vise. While a district court has broad discretion in determining the probativeness of statistics, *Sears*, 839 F.2d at 310, if the statistical model fails to account for an important factor, reliance on that model constitutes clear error. *Chicago Miniature*, 947 F.2d at 301. Such is the case here: the statistical model on which the district court relied was fatally flawed because the relevant labor market used by the EEOC failed to identify qualified and interested applicants.

The statistical model on which the district court relied was flawed first of all because O & G had a preference for hiring skilled or experienced workers since even in the secondary department employees were required to read blueprints to operate the manual punch and stamp presses. Also O & G desired to promote to more skilled jobs from within. 705 F. Supp. at 406. In making its hiring decision, Ted Gryezkiewicz testified, the preference for experienced workers played a role in approximately 90 percent of O & G's hiring decisions. The district court found that O & G in fact had a preference for skilled workers and that this preference was reasonable. 705 F. Supp. at 402, 406. Notwithstanding this finding, however, the district court credited as evidence Dr. de Vise's statistical model which failed to account for this skill and experience factor. This variable was too important to be ignored because "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989).

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[1]The court recognizes that the plaintiff failed to show that any vacancies existed at the time that the seven people applied, opinion at 2, n.3, but nonetheless credits this evidence as evidence of individual acts of intentional discrimination.

Reliance on a statistical model which fails to account for such an important variable is clearly erroneous. *See, e.g., Chicago Miniature*, 947 F.2d at 301-03.

The EEOC argues that since O & G did not require all of its new hires to have experience or training, the failure to account for this preference is irrelevant. But as we noted in *Holder v. Old Ben Coal Co.*, 618 F.2d 1198, 1201-02 (7th Cir. 1980), the Supreme Court has said a "Title VII plaintiff must show that rejection for a job did not result from 'the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualification or the absence of a vacancy in the job sought.'" (quoting *Teamsters*, 431 U.S. at 358 n.44) (emphasis added). Thus *Holder* logically concluded: "[a] desire to hire the more experienced or better qualified applicant is a non-discriminatory, legitimate, and common reason on which to base a hiring decision." *Holder*, 618 F.2d at 1202. *Accord Heerdink v. Amoco Oil Co.*, 919 F.2d 1256, 1260 (7th Cir. 1990). Or as now Chief Judge Posner put it in *Mason v. Continental Ill. Nat. Bank*, 704 F.2d 361, 364 (7th Cir. 1983): "No rational enterprise that has several qualified candidates for a position selects among them by lot; it picks the best qualified."

The statistical model was also fatally flawed because it failed to identify the interested portion of the labor market. "The identification of a relevant labor market--the key issue in a class--based Title VII case--means not only identifying qualified potential applicants for the job at issue but also identifying interested potential applicants." *Chicago Miniature*, 947 F.2d at 302. The statistical model that the district court relied on in this case failed to identify the interested applicants for jobs at O & G because it did not consider that O & G does not require its workers to speak or read English. The lack of an English fluency requirement increases the interest of non-English speaking Polish and Hispanic job-seekers to work at O & G. 705 F. Supp. at 406. The statistical model also failed to account for the fact that Polish and Spanish were routinely spoken at O & G. This would also reduce the interest of the

English speaking black (and white) labor market to work at O & G., *Cf.* 705 F. Supp. at 406.[2]

We held in *Chicago Miniature*, 947 F.2d at 301, that failing to account in a statistical model for the fact that an employer did not require its workers to speak English rendered the statistical evidence defective. We also held that crediting such statistical evidence as proof of disparate treatment constituted clear error. I would follow the precedent of *Chicago Miniature* and conclude that the district court clearly erred in crediting the EEOC's statistical model as evidence of a pattern or practice of intentional discrimination by O & G. This flawed model failed to account for, not just the lack of an English-fluency requirement, but also the prominent use of the Spanish and Polish languages in the workplace at O & G.

Even though the statistical model failed to account for the lack of an English fluency requirement, the prominent use of Spanish and Polish at O & G, and O & G's preference for skilled or experienced labor, this court reasons that the district court factored these considerations in its analysis of the statistical model because not requiring fluency in English was offset by low pay and poor working conditions (which is incidentally another logical reason why English-speaking job-seekers would not apply). One would think that only immigrants who spoke little or no English would take these jobs if working conditions and pay were bad. Since they couldn't work elsewhere because of a language requirement, this was their only alternative. English-speaking workers with experi-

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[2]Contrary to the court's portrayal of bias, opinion at 8, 23, it is not the presence of Polish and Spanish workers at O & G that would dissuade anyone, black or white, from applying. Rather, it is the language barrier and the lack of "comfort in the language setting" that would lessen the interest of English-speaking workers--of any race--to work where Polish and Spanish are routinely spoken by co-workers. 705 F. Supp. at 403, 406. Just as Polish- and Spanish-speaking workers would be attracted to a workplace where they could communicate with other workers, 705 F. Supp. at 406, people who do not speak those languages well might not apply because of their inability to communicate with a substantial portion of the existing work force.

ence would go to a better workplace with higher pay. *See* 705 F. Supp. at 406. In fact, Dr. de Vise testified to this effect.

Nevertheless, the court concludes that the lack of an English fluency requirement "could not account for the absence of any African-American hires. . . ." Opinion at 7. The district court also ignored the major defects in the statistical model[3] because O & G did not have any black employees among its thirty-five secondary workers. 705 F. Supp. at 409. This court, however, states that "O & G's failure to hire African-Americans would be justified in statistical terms if African-American availability were 6 percent of the labor market. . . ." Thus, by the court's own formula, the absence of any black employees among the thirty-five who worked

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[3]In fact, the district court recognized that these exact factors would cause a disparity in the racial composition of O & G's workforce, stating:

> Given the background of O & G, i.e., its founder being a Polish immigrant speaking fluent Polish, and the fact that O & G had its start-up with Polish employees taken from American Spring, it is obvious that Polish immigrants would be drawn to work at O & G in numbers in excess of Polish immigrants in the work force at large. It is certainly reasonable to expect that employees who do not speak English would be more comfortable working for a company that has a large number of Polish-speaking employees. It is also to be expected that immigrant populations would have a network to communicate the availability of jobs in Polish-speaking surroundings. The same would be true for Hispanic immigrants who also would be expected to be drawn to an employer that has a substantial number of Hispanic-speaking employees.
>
> It is also reasonable to expect that recent immigrants would be willing to work at lower pay and under poorer conditions as an offset for comfort in the language setting.
>
> It is also reasonable for an employer such as O & G to have a preference for employees with experience or a technical background because of its lack of a training program and its desire to promote to skilled jobs from within rather than to incur the expense of advertising for skilled employees.

705 F. Supp. at 406.

in the secondary department is statistically explainable. The court, however, does not think this is statistically possible--in other words, the court does not believe that black worker availability could possibly drop to 6 percent even if the statistical model properly defined the relevant labor market as the relevant qualified and interested labor market.

This conclusion misapprehends the significant impact the lack of an English fluency requirement, alone, has on the composition of a work force. In *Chicago Miniature*, 947 F.2d at 303, this court demonstrated just how significant this one factor is on the racial makeup of a work force by presenting the following hypothetical:

> Assume that five employers are equidistant to 300 job-seekers: 100 blacks, 100 whites, and 100 Hispanics. Assuming that all employers are equally attractive and have identical requirements and conditions, then one would expect each employer to receive approximately 20 applications from each ethnic group. Each employer would have a racially balanced applicant flow.
>
> However, if employer No. 1 had no English fluency requirement and the other four employers did have an English fluency requirement, a different pattern would emerge. Assuming that all of the blacks and whites are fluent, as well as 50 of the Hispanics, and that the other 50 Hispanics are not fluent, then employer No. 1 would receive 60 percent of its applications from Hispanics (all of the non-fluent Hispanics applications and its share of the fluent Hispanics), 20 percent from blacks, and 20 percent from whites. Thus, if the non-fluency characteristic of employer No. 1 was ignored, it would appear to be discriminating against blacks and whites. Conversely, the other four employers would appear to be discriminating against Hispanics, because the majority of Hispanics, for nondiscriminatory reasons, would apply to employer No. 1.

This hypothetical clearly shows that the absence of an English fluency requirement could greatly impact the percentage of interested workers. In fact, under the circumstances of this case the racial

make-up of the interested labor market would be even more skewed because a percentage of the white job-seekers in this Polish immigrant neighborhood would be assumed not fluent in English. This still does not even take into account that many English speaking job-seekers may not want to work in an environment of predominantly foreign languages (especially given the low pay and apparently poor working conditions). 705 F. Supp. at 406. It also does not account for O & G's preference for skilled or experienced workers.[4].

The district court reasoned that even though the statistical evidence was flawed in certain respects, it nevertheless supported a finding of intentional discrimination. A statistical model, however, is only as impressive as the underlying hypothesis. *Chicago Miniature*, 947 F.2d at 301. Where a hypothesis is faulty, it does not support its conclusion. *Id.*; *cf. Free v. Peters*, 12 F.3d 700, 705 (7th Cir. 1993) ("So deficient is Professor Zeisel's study that . . . the study would not support [its] conclusion. . . ."). As explained above, the hypothesis underlying the statistical model used in this case was fatally flawed because it misidentified the relevant labor market by failing to identify the qualified and interested portion of the labor market. Therefore, this statistical model does not support its conclusion that O & G intentionally discriminated against black applicants.

The district court recognized this flaw, noting that "the relevant labor market for O & G was never clearly established by plaintiff." 732 F. Supp. at 73. The district court and this court, however, attempt to remedy the flawed hypothesis by modifying the results of the hypothesis. We are not statisticians, however, and cannot know the actual impact a change in the underlying hypothesis can have on the conclusion that hypothesis supports. If the EEOC is going to rely solely on statistical data to prove a case of intentional discrimi-

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[4]O & G's preference for skilled or experienced workers also explains why approximately half of its workforce is Polish. In Poland, technical training is taught in high school. This includes training the student how to read rulers and micrometers and how to operate lathes, milling machines, and presses.

nation, it is imperative that the model be valid; no amount of judicial intuition can rectify a defective statistical model. Therefore, contrary to the court's position, the absence of black employees in the secondary department could have been accounted for by the statistical model had it considered the lack of an English fluency requirement, the use of the Polish and Spanish languages at O & G, and O & G's preference for skilled or experienced workers. *Chicago Miniature*, 947 F.2d at 292. *See also Sears*, 839 F.2d at 334-35 ("interest [in the job] alone can account for the disparities computed under EEOC's analysis"). The failure of this model to account for these variables rendered the model unreliable and it was clear error for the district court to credit it as evidence of intentional discrimination. *Chicago Miniature*, 947 F.2d at 302.[5]

What this case really comes down to is the fact that from 1979 to 1985, none of the thirty-five secondary employees of O & G were black. In this court's opinion (and that of the district court), this "inexorable zero" seals O & G's fate. The concept of "inexorable zero" first arose in *Teamsters*, 431 U.S. at 342 n.23. Since then this court has recognized that an "inexorable zero" is evidence of intentional discrimination. *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 524 (7th Cir. 1994). In fact, dicta in *Loyd* indicated that a 100

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[5]The EEOC's failure to present any evidence of individual acts of intentional discrimination confirms the weakness of the statistics. "This court has recognized that 'examples of individual discrimination are not always required, but we think that the lack of such proof reinforces the doubt arising from the questions about validity of the statistical evidence.'" *Sears*, 839 F.2d at 311. *See also Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604 (2d Cir. 1986) ("In evaluating all of the evidence in a discrimination case, a district court may properly consider the quality of any anecdotal evidence or the absence of such evidence."). Moreover, this court has recognized that "strong statistics may prove a case on their own, while shaky statistics may be insufficient unless accompanied by additional evidence." Op. at 6 (citing *Teamsters*, 431 U.S. at 340); *Chicago Miniature*, 947 F.2d at 300-01. Thus "when the statistical evidence does not adequately account for 'the diverse and specialized qualifications necessary for [the positions in question]' strong evidence of individual instances of discrimination become vital to the plaintiff's case." *Sears*, 839 F.2d at 311 (internal quotations omitted). This vital evidence is totally lacking in this case.

percent segregated work force "is sometimes alone sufficient to support judgment for the plaintiff." *Id.*

But every zero is not "inexorable." *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 494 (8th Cir. 1984) (Swygert, J., dissenting). *See, e.g., Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 656, 94 L.Ed. 2d 615, 107 S. Ct. 1442 (1987) (O'Connor, J., concurring) (no discrimination in fact existed even though there were no women in skilled craft positions). To say otherwise would go against Congress' caution to "employers not to engage in hiring quotas. . . ." *Chicago Miniature*, 947 F.2d at 296 (quoting 42 U.S.C. § 2000(e)-2).

In this case, a small work force is involved--only thirtyfive positions. In contrast, in *Teamsters* the work force included over 1800 positions. *Teamsters*, 431 U.S. at 337. Where a zero may be inexorable when such a large work force is involved, it is not when the work force is so small.[6] Moreover, where, as here, the 100 percent work force is statistically explainable, the absence of a certain race or gender is alone insufficient to support a finding of intentional discrimination.[7]. In other words, the "zero" in this case is not inexorable and, therefore, it cannot constitute sufficient evidence that O & G engaged in intentional discrimination.

B. *Remedy*

Even if I were to agree with the court that sufficient evidence existed to support a finding of intentional discrimination, I would nonetheless conclude that the district court erred in ordering O & G to pay more than $378,000 in back pay to some 451 claimants. 790 F. Supp. at 780. The district court calculated the amount of back

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[6]The EEOC also points out that small sample sizes also provide misleading results in standard deviation analysis and unless the total number in the sample is at least thirty, such an analysis is of no statistical significance.

[7]O & G's workforce was not completely without black employees, but at the time in question the thirty-five secondary workers did not include any.

pay by first determining O & G's hiring shortfall of black workers. However, in determining O & G's hiring shortfall, the district court relied on the 22.5 percent labor market availability presented by Dr. de Vise. But as both the district court and this court recognize, this percentage failed to account for the prominent use of the Polish and Spanish languages at O & G, the lack of an English fluency requirement, and O & G's preference for skilled or experienced workers. Even assuming that the court is correct that these factors —would not reduce the availability of black applicants to 6 percent—the percentage required to support a finding of no discrimination—they clearly reduce the percentage of blacks in the labor pool by something. How much they reduce the availability of interested black applicants, however, is unclear. As the earlier hypothesis demonstrated, the lack of an English fluency requirement by itself substantially skewed the racial composition of the interested labor market. A significant reduction in the interested labor market would have a correspondingly significant reduction in the amount O & G must pay in back pay. This is especially true when a small company is involved.

As troubling as the actual award and the amount of back pay, is the EEOC's publication of the following advertisement in the Chicago Tribune, Chicago Sun Times, Chicago TV Guide and Chicago Defender:

> If you are black and you were looking for a kick and/or punch press operator job between 1979 and 1985 at O&G Spring & Wire Forms Specialty Company, located at Division and Kostner in the city of Chicago, or if you were looking for that kind of work in the surrounding area, you may be eligible for a monetary payment as a result of a lawsuit filed by the federal government, *EEOC v. O&G Spring & Wire Forms Specialty Company*, No. 85 C 9966, pending in federal court.

The ad then encouraged the reader to send for an EEOC claim form.

Not surprisingly, 451 claims were submitted. This result can be compared to incidents where city buses are involved in traffic accidents. Jump-ons or ghost riders get on the stalled bus, then claim injury.[8] Apparently in this case some claimants were in prison during the period when they supposedly would have applied. Others held better and higher-paying jobs. O & G elected not to engage in the expensive process of challenging claims of individual class members because its already substantial financial burden had a fixed amount. Even so it had to pay $8000.00 to run the ads. Since the EEOC did not bother to clean out the seemingly fraudulent claims, any windfall went to the payees. *See Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1429-30 (7th Cir. 1986). The only likely remaining deterrent to further fraud on the court would be the likelihood that successful claimants would not tell others because additional claims would reduce their cut.

Even where liability is without question, this process flies in the face of common sense. Tedious as it may be, the EEOC should carefully screen claimants before allocating compensation for the alleged wrong.

II. Attorney's Fees

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[8] *See, e.g.*, Peter Kerr, *"Ghost Riders" Are Target of an Insurance Sting*, N.Y. Times, Aug. 18, 1993, at A1 (video cameras inside a bus involved in a staged accident filmed seventeen people scrambling onto the bus after the accident occurred but before police arrived); Peter Kerr, *Insurance Fraud Sting Catches "Ghost Riders" Who Jump on the Bandwagon in New Jersey Bus Crashes*, Guardian Newspapers Limited, Aug. 19, 1993, at 18 (in one case, twenty-seven bus passengers filed claims even though the bus was not in an accident--the crash the passengers heard came from behind the bus and involved only a car and a lorry, not the bus); Conor O'Clery, *Bus Firm Exorcises Its Ghosts*, The Irish Times, Aug. 19, 1993, at 1 (one videotape made during a staged accident showed a man jumping on board and declaring to the passengers: "All you people who want to get paid, you stay right there, stay down. Wait for the ambulance to come. Your neck hurts, your legs hurt, all of that. You'll get some money. Stay there. They pay.").

The EEOC's suit against O & G was not limited to its racial disparate treatment claim; it also filed suit against O & G for intentional discrimination based on age. The district court found no violation of the Age Discrimination in Employment Act, 29 U.S.C. § 666 ("ADEA"), but nonetheless concluded that O & G was not entitled to recover attorney's fees from the EEOC.

This court holds that while the Equal Access to Justice Act ("EAJA") applies to actions brought under the ADEA, O & G is not entitled to fees under this Act. I agree that the EAJA applies to age discrimination suits. However, I conclude that O & G was entitled to recover attorney's fees from the EEOC under the EAJA.

"Under the EAJA the government bears the burden of proving that its position was substantially justified." *Marcus v. Shalala*, 17 F.3d 1033, 1036 (7th Cir. 1994). The position of the United States is substantially justified if it is "justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 101 L.Ed. 2d 490, 108 S. Ct. 2541 (1988). "EAJA fees may be awarded if either the government's prelitigation conduct or its ligation position are not substantially justified." *Marcus*, 17 F.3d at 1036. "Thus, fees may be awarded in cases where the government's prelitigation conduct was not substantially justified even though its litigating position may have been substantially justified and vice versa." *Id.*

In this case, the district court concluded that the EEOC's position alleging age discrimination was substantially justified because it had retained an expert to testify on its behalf. Just because a litigant can obtain an expert to testify on its behalf, however, does not mean that the litigant's position is reasonable. Litigants often attempt to submit irrelevant and unreliable "expert" testimony to support their case. *Cf.*, *Daubert v. Merrell Dow Pharm., Inc.*, 125 L.Ed. 2d 469, 113 S. Ct. 2786, 2796 (1993).

In this case, the EEOC had retained Dr. de Vise to present a statistical model in support of its position that O & G discriminated against persons over forty-five. This statistical model was not

scientifically valid, however. Or as the district court stated, it was like comparing "apples to oranges." 705 F. Supp. at 407. A look at the model offered by Dr. de Vise demonstrates the obvious flaw. Dr. de Vise created a statistical model which compared the percentage of persons over forty-five hired at O & G to the percentage of persons over forty-five already working in other facilities in similar positions in Chicago and Cook County. 705 F. Supp. at 400. This statistical model was more than unscientific, it was completely misleading. In fact, the district court found Dr. de Vise's reliance on this model so incredible that he called into question Dr. de Vise's credibility concerning his other testimony. It was unreasonable for the EEOC to attempt to rely on this obviously inappropriate statistic.

The EEOC's reliance on this faulty statistic borders on bad faith. This is especially true given the fact that the EEOC had access to a valid comparison, but apparently ignored this statistic because it disproved its case. The proper scientific comparison would have been the percentage of people over age forty-five then working at O & G, with the percentage of workers at other similar facilities over age forty-five. 705 F. Supp. at 407. This proper comparison demonstrates that in 1986, over 50 percent of O & G's work force was over age 45, while only 37 percent of comparable employees at other facilities were over forty-five. 705 F. Supp. at 407. This comparison not only does not prove the EEOC's case, it disproves it. It is troubling to think that an agency of our federal government would retain an expert to generate an invalid statistical comparison to prove discrimination where none exists. "Mark Twain said the same thing perhaps more memorably: 'There are three kinds of lies—lies, damned lies and statistics.'" *Griffin v. Board of Regents of Regency Univ.*, 795 F.2d 1281, 1289 (7th Cir. 1986).

The EEOC's misuse of its power is further evidenced by its modification of its age discrimination claim. The EEOC's original complaint alleged that O & G discriminated against five people. At

trial the EEOC presented only three of the original five people[9] and the court did not find that any of them had applied for a vacant position at O & G. In fact, in the case of two of the three witnesses, the next persons hired by O & G were ages forty-five and fifty-five. Instead of dropping the suit after determining that these five individuals were not the victims of discrimination, the EEOC somewhere along the line changed the emphasis of its suit from individual acts of discrimination to a pattern or practice of discrimination. The EEOC then placed reliance on an invalid and unscientific statistical model. Worse yet, the EEOC's complaint originally asserted that O & G discriminated against persons forty and over. 30.4 percent of O & G's new hires were, however, forty years old or older. 705 F. Supp. at 403. This high percentage of new hires apparently did not support a claim of discrimination because somewhere along the line, the EEOC modified its claim to involve persons forty-five or older, thus reducing O & G's percentage of new hires to 17 percent. Again, instead of dropping its suit against O & G, the EEOC forged forward. (Moreover, statistics aside, if the EEOC wants to rely on the so-called "inexorable zero" as proof of discrimination, it cannot ignore the prominent panorama of older workers--more than twenty-six workers of the approximately fifty-three workers were over forty-five. 705 F. Supp. at 403, 406.)

The EEOC is "an arm of the federal government with authority to subject its citizens to the burdens of litigation. With this authority comes a responsibility. . . ." *United States v. Hodgekins*, 28 F.3d 610, 614 (7th Cir. 1994). The facts of this case demonstrate that the EEOC not only neglected its responsibility, it abused its power. Its behavior goes beyond the realm of reasonableness. "The Equal Access to Justice Act was intended, one might have thought, for just such a case as this, where a groundless . . . suit is brought by the mighty federal government against a tiny firm. . . ."

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[9]In fact, one of the five testified during a deposition that he did not file a claim with the EEOC and he had no idea how his name was placed on the EEOC's complaint. another failed to appear altogether.

E.E.O.C. v. Consolidated Serv. Sys., 989 F.2d 233, 238 (7th Cir. 1993).

The EEOC argues that its position was reasonable based on two letters. The first letter, one from O & G's attorney, stated: "Many of the machines do require a younger person because of the extensive effort required to operate the machines and move the necessary part." The second letter, written by O & G's controller, stated: "Because of these demanding aspects of Secondary Work, we prefer to hire younger males between 20-45 years old." The district court in concluding that the EEOC's position was reasonable did not rely in any way on these letters, likely because the letters were unauthorized and incorrect statements of O & G's policy. The EEOC nonetheless claims that these letters provided a reasonable basis for bringing an age discrimination suit. These letters may have originally provided a reasonable basis for investigating a claim of age discrimination. Once the EEOC began an investigation, however, it would be immediately apparent from the make-up of O & G's work force that no such discrimination occurred. At that point, the EEOC would no longer be justified in continuing its claim against O & G. Since EAJA fees are appropriate where either "the government's prelitigation conduct or its ligation position are not substantially justified," *Marcus*, 17 F.3d at 1036, any initial justification provided by the letters does not protect the EEOC from an award of fees for its unjustified litigation position. *Id.*

III. Conclusion

This entire case is founded on a very flawed statistical analysis. Thus the evidence was insufficient to prove racial discrimination. The same statistics resulted in an award that was too high coupled with a distribution remedy that invited fraud. And the EEOC's pursuit of its non-existent ADEA claim justifies attorney fees to the defendant. As I stated at the outset, this case troubles me. No doubt the EEOC has a broad range of potential victims to look after. Among those vulnerable are non-English-speaking Polish and Hispanic immigrants who are exposed to discrimination because of their race and/or their national origin. By not taking the language

factor into consideration the EEOC has in effect put a quota on one vulnerable group at the expense of another.

In the recent case of *Consolidated Service*, 989 F.2d at 237, the EEOC brought suit against a company owned by a Korean immigrant, charging the company with discrimination in favor of persons of Korean origin. The district court found the immigrant company liable, but this court reversed. In authoring that opinion, now Chief Judge Posner wrote:

> In a nation of immigrants, this must be reckoned an ominous case despite its outcome. The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses--grocery stores, furniture stores, clothing stores, cleaning services, restaurants, gas stations--have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring.

Id. at 237-38.

Judge Posner's prophecy has come to pass in this case. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 85 C 9966
	)	Judge Leinenweber
O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In accordance with Fed.R.Civ.P. 52(a) the court finds that the facts specifically as set forth in the following Findings of Facts and states the following Conclusions of Law. To the extent any of the findings reflect legal conclusions they shall be deemed conclusions and to the extent that any of the conclusions as stated reflect factual findings they shall be deemed findings.

FINDINGS OF FACT

I. Parties

1. The Equal Employment Opportunity Commission ("EEOC") is the agency of United States charged with the administration and enforcement of Title VII of the Civil Rights Act of 1964 and of the Age Discrimination Employment Act of 1967 ("ADEA"). O & G Spring and Wire Forms Specialty Company ("O&G") is a corporation with its offices and factory located at the southwest corner of Division and Kostner Streets in the City of Chicago.

II. Jurisdiction and Venue

2. The court has jurisdiction over the parties and subject matter of this action under Title VII and the ADEA.

3. Venue is proper under 28 U.S.C. § 1391(b).

4. O&G is an employer in an industry affecting commerce within the meaning of 42 U.S.C. §§ 2000e(g), (h) and 29 U.S.C. § 203.

5. All conditions precedent to suit have been satisfied by the EEOC. Specifically, one Walter Harris filed a charge of discrimination alleging race discrimination under Title VII and age discrimination under the ADEA with the EEOC on October 22, 1984 (plaintiff's ex. 1). He had applied for and been denied employment by O&G within the three hundred day period preceding the filing of the charge (plaintiff's ex. 345). The EEOC deferred the charge to the Illinois Department of Human Rights which waived its initial right to process the charge. O&G received notice of the charge, the EEOC investigated the charge, and on July 8, 1985 the District Director of the EEOC issued a letter of determination and letter of violation finding reasonable cause to believe that O&G had continuously discriminated against blacks and persons over the age of forty as a class in recruiting and hiring (plaintiff's ex. 11). A copy of this determination was received by O&G (Tr. 512-13). The EEOC attempted to conciliate the charge, was unsuccessful, and on July 24, 1984 O&G was advised that the EEOC's efforts to conciliate the charge were unsuccessful.

III. Background Facts About O&G

6. O&G is in the business of making springs and specialty forms from wire to order. Its customers include part suppliers to the automobile manufacturers, and other manufacturers and assemblers of products needing springs. It enjoys an excellent reputation for quality workmanship in its field (Tr. 754-55). It is a corporation with fifty percent of its shares owned by its president,

Ted Grzeszkiewicz ("Grezeszkiewicz"), and fifty percent by its secretary/treasurer, Joseph Olinyk.

7. The company was started by Grezeszkiewicz in 1966 at Addison, Illinois and moved to its present location at the southwest corner of Division and Kostner in 1970.

8. Grzeszkiewicz was born in Poland, speaks fluent Polish, and English with a decided accent. Prior to forming O&G he worked for sixteen years as a tool designer and trouble shooter for American Spring & Wire ("American Spring"), a company that also specialized in making springs and other wire products. When Grzeszkiewicz left American Spring to form O&G in 1966, American Springs' work force was approximately ninety percent Polish-born and speaking. When he started up O&G he needed people and some of the American Spring people came over to O&G to work for him.

9. Throughout the 1970's O&G employed a modest work force of twelve to fifteen persons, which included three plant clerical people. In the early 1980s the work force began to increase. For the pay period ending March 31, 1981 O&G employed a total of forty. On March 31, 1982 O&G employed a total of forty-four people. On March 31, 1983 O&G employed a total of forty-one people. On March 31, 1984 O&G employed fifty-seven people. On March 31, 1985 O&G employed fifty-three people and on March 31, 1986 it employed forty-seven people (plaintiff's ex. 342A). These numbers include at least two or three clerical people for each year as well as certain skilled workers and supervisory employees.

10. The work of O&G involves low-skilled employees who operate kick and punch presses. O&G also employs skilled employees in tool and die making, heat treating and grinding. While past experience is desirable for the low-skilled jobs it is not necessary. Only the low-skilled category is involved in these Title VII and ADEA claims.

11. For the time period encompassed in this suit (1979 through 1987), O&G hired ninety-nine people for low-skilled jobs, of which five were black. However for the seven years, 1979 through 1985, when eighty-seven persons were hired for low-skilled jobs, no blacks were hired, while in 1986 and 1987 twelve persons were hired for these jobs, of which five were black (plaintiff's ex. 351A).

12. O&G has used employment applications since at least 1977. Applications are available only since 1983, those earlier having been legally destroyed. These applications indicate that slightly more than fifty percent of the persons hired were Polish and fifteen percent were Hispanic. Those employees identified as Polish or Hispanic indicated on employment applications that they either spoke Polish or Spanish, were educated in Poland or in a Spanish--speaking country, or were employed in Poland or in a Spanish-speaking country (plaintiff's ex. 366).

13. During the same period two hundred eleven applications were turned down, twelve and seven tenths percent were black, fifteen percent Polish, and thirty-two percent Hispanic.

14. There was a dramatic increase in the number of black applications after the complaint was filed with by EEOC. For the years 1984 and 1985, out of a total fifty-eight applications, four were black or approximately seven percent. For the years 1986 and 1987, twenty-seven out of one hundred fifty-four applications were black, or seventeen and one-half percent. It was in 1986 that O&G first began hiring blacks into unskilled positions.

15. In 1986, of the thirteen persons hired for shop work, three were black, nine were Polish and none were Hispanic. In 1987, of the six persons hired, three were black, two were Polish and one was Hispanic.

16. O&G relies almost entirely upon word of mouth to recruit applicants for its low-skilled jobs. It has never consulted the Illinois Job Service. On one occasion in the early 1980s it advertised in the Chicago Tribune for a shipping clerk and on another occasion in the

early 1980s it advertised for skilled positions in the Polish language press. However the main source of information was from current employees of prospective applicants who would be available for employment with the company. The company exercises a strong preference in hiring to the personal recommendations of present employees (plaintiff's ex. 21, defendant's answers to interrogatories No. 4).

17. Of the seventy-one people hired at O&G between 1979 and 1985, twenty were age forty or older, forty-seven were under forty, and four did not have an available age. Factoring out the four whose ages were unknown, therefore thirty percent of the hires were forty or older and seventy percent of the hires were younger than forty. Thirteen of the new hires were forty-five or older, or nineteen and four tenths percent (plaintiff's ex. 416). When only considering unskilled jobs by age O&G did a little better. From 1979 through 1987, eighteen percent of those hired in unskilled jobs were forty-five or older.

18. During 1984 through 1987, the period of time in which O&G maintained its applications, O&G received approximately two hundred fifty-seven applications and hired fifty individuals (including two who were rehired), or roughly twenty percent. Forty-four of the total applicants indicated they were forty or older, of which O&G hired twenty-two or fifty percent. Of the two hundred fifteen applicants not hired during this period, one hundred six did not give their ages on the application. Assuming that the age distribution of those who did not give their ages parallel those that did, then approximately forty-four of the applicants not hired were more than forty. Under this hypothesis O&G hired approximately one-third of those over forty. Piecing together information from several exhibits, specifically plaintiff's Nos. 34 and 342, it would appear that as of June 30, 1986, of the fifty-three people then employed, twenty-seven were forty and older or fifty-one percent.

IV. Statistical Evidence of Discrimination

According to Testimony of Pierre de Vise

19. Dr. Pierre de Vise ("de Vise"), Professor of Roosevelt University School of Urban Planning, was retained by the EEOC to determine the relevant labor market for the low-skilled workers at O&G.

20. Taking the residential origins reflected on applications produced by O&G by a mile ring from the O&G site for the years 1979 through 1987, and taking the percentage of black machine operators located in the same mile ring according to the 1980 census, de Vise determined that in the period from 1979 through 1987 there was an approximate twenty-three percent black availability (plaintiff's exs. 386-88).

21. de Vise then determined the number of blacks working as operatives, that is low-skilled jobs, for employers in O&G's EEO-1 reporting zip code (60651) and the eight zip codes surrounding O&G, and determined that the percentage of employees in the operative jobs for the years 1980 through 1985 varied from a low of twenty-six and seven tenths percent in 1982 to a high of twenty-eight and eight tenths percent in 1985. Private sector employers of one hundred or more employees, or employers with fewer than one hundred employees at a specific location if the employer had a total of one hundred employees at all locations, or a government contractor employer regardless of the number of employers, are required to file annually a document called EEO-1 Annual Survey listing, inter alia, the race of workers by categories. de Vise selected "operatives" which is defined as

> "Operatives (semi-skilled) -- Workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: apprentices (auto mechanics, plumbers, bricklayers, carpenters, electricians, machinists, mechanics building trades, metal-working trades, printing trades, etc.), operatives, attendants (auto service and parking), blasters, chauffeurs, delivery workers, dressmakers and sewers (except factory), dryers, furnace workers, heaters

(metal), laundry and dry cleaning operatives, milliners, mine operatives and laborers, motor operators, oilers and greasers (except auto), painters (except construction and maintenance), photographic process workers, stationary firefighters, truck and tractor drivers, weavers (textile), welders, and flamecutters, and kindred workers" (plaintiff's ex. 397).

22. Finally, de Vise determined, again according to census data, that the percentage of blacks in the various categories of operators was higher in the City of Chicago than it was in Cook County which, in turn, was higher than the six-county SMSA. It ranged from thirty-five and one tenth percent of all operators, fabricators and laborers in the City of Chicago being black to twenty-two and one-half percent being black in the six-county SMSA.

23. It was de Vise's opinion that all of these percentages understated the availability of blacks because all of these statistics excluded unemployed and the percentage of black unemployment exceeded that of white by two or three times. He also opined that these figures understated blacks because blacks are available for low-paying jobs such as O&G in a greater percentage than whites because they have less training and those with less training are unemployed in greater percentages.

24. Finally, using these percentages as indicative of the relevant labor market he determined of O&G's eighty-seven total hires between 1979 through 1985, using the most conservative rate of punching and stamping press machine operators in the City of Chicago, of twenty-two and one-half percent (plaintiff's ex. 390) the number of hires expected in a color-blind process would have been nineteen and six tenths percent blacks; using the availability of black machine operators by areas of residence (plaintiff's ex. 388) the number of hires expected was twenty and one tenth percent blacks; and using the percentage of blacks employed as operatives in O&G's home zip code of 60651 being thirty-one and eight tenths

percent would indicate the number of black hires expected to be twenty-seven and seven tenths percent (plaintiff's ex. 389).

25. Finally, using standard deviation analysis with a statistical disparity between actual and expected number of blacks hired by O&G indicated a projected probability of less than three in one million for each calculation that O&G would have hired no blacks into unskilled positions using a color-blind process.

b. Age

26. According to de Vise, using 1980 census figures, the percentage of machine operators forty-five years and older in the Chicago-area labor force in 1980 ranged between thirty-six and six tenths percent for metal working and plastic working machine operators to thirty-seven and seven tenths percent for machine operators and tenders of Cook County 1980. He opined that based upon these figures O&G's actual hires from 1979 through 1987 of seventeen forty-five and older low-skilled employees, was approximately one-half of what would have been expected.

27. Again using statistical disparity of numbers in standard deviation analysis, the projected probability resulted in probabilities of the range of two to seven out of one hundred thousand.

Testimony of Dr. Glen Meyers

28. Defendant called as its expert, Dr. Glen Meyers ("Meyers"), a labor economist.

29. Meyers attacked de Vise's labor market categories as too imprecise to be relied upon because all of his categories included large employers as well as small employers. This is important because small employers lack formal training programs and consequently need to hire people with more experience than do large employers who have in-house training programs available. Also, the kick presses used by O&G's unskilled labor are manually

operated and are more difficult to operate than stamp presses which are automated. All of de Vise's figures include both.

30. Accordingly, it was Meyers' opinion that none of the categories used by de Vise was reliable. In Meyers' opinion the EEOC should have taken a survey within a five mile radius of the O&G plant to identify the race of workers who have jobs similar to a kick press at small companies like O&G. Since this was not done it is impossible to determine the percentage of blacks in the relevant labor market because the relevant labor market was not determined.

31. It was Meyers' opinion that the relevant labor market for O&G is top heavy with recent immigrants who do not speak English because O&G, paradoxically needs higher skilled employees who will work for lower pay than do larger employers who, more probably unionized, would be willing to take lower skilled employees without any training at higher rates of pay. It was his opinion that recent immigrants, particularly those not speaking English, less knowledgeable about the labor market, would be more willing to take the harder work and harsher conditions with lower pay that was offered by O&G and similar companies.

32. Meyers attempted to discount the marked increase of blacks in application flow since 1986. In his opinion this increase resulted from three factors interacting: 1) the change in the immediate neighborhood which went from approximately ten to fifteen percent black in 1984 to approximately fifty percent black in 1986, 2) the opening in 1986 of a flea market across the street from O&G which greatly increased weekend pedestrian traffic, a high percentage of which was black, and 3) decline of employment in the area due to closure of manufacturing operations.

33. According to Meyers, those seeking work, particularly at entry level, are more likely to be unemployed. In fact analysis of O&G's employment applications indicated that ninety percent of those applying indicated they were in fact unemployed. Accordingly, de Vise should have used the percentage of those over forty-five who were unemployed in the particular employment

category as the relevant labor market for forty-five year olds. According to labor statistics for the first quarter of 1988 only twenty-seven and eight tenths percent of unemployed job seekers were forty-five years and older. He further reasoned that employed persons were much less likely to seek entry level positions and the ranks of the unemployed contained a relatively greater number of unskilled than skilled workers. He further opined that older workers tend to have more experience than younger workers and accordingly would be less likely to apply for entry level positions such as is available at O&G.

34. Specifically, Meyers testified that O&G's hiring procedure of relying on word-of-mouth and walk-ins was reasonable because 1) O&G needed skilled craftsmen, 2) there was a relative shortage of such craftsmen, 3) it was unable to initiate and maintain a formal internal training program, 4) most Polish-born workers had technical training in high school, 5) O&G had an inability to deal with the kind of numerical applicant flow that would result from placing ads in newspapers, and 6) of low cost.

35. Meyers also opined that O&G's preference for a technical training background in its entry level employees was reasonable and a business necessity because 1) O&G needed to obtain from the labor supply in an economical manner individuals who were capable of moving into skilled positions because of its lack of training, 2) its need to avoid employee error, 3) it needed employees capable of frequently adapting and re-adapting because of a wide variety of production runs, and 4) because of the relative difficulty of operating the manual kick press.

Court's Finding Regarding Discrimination

36. The court finds that there is a certain amount of truth in the testimony of de Vise and in the testimony of Meyers.

37. Given the background of O&G, i.e., its founder being a Polish immigrant speaking fluent Polish, and the fact that O&G had its start-up with Polish employees taken from American Spring, it

is obvious that Polish immigrants would be drawn to work at O&G in numbers in excess of Polish immigrants in the work force at large. It is certainly reasonable to expect that employees who do not speak English would be more comfortable working for a company that has a large number of Polish-speaking employees. It is also to be expected that immigrant populations would have a network to communicate the availability of jobs in Polish-speaking surroundings. The same would be true for Hispanic immigrants who also would be expected to be drawn to an employer that has a substantial number of Hispanic-speaking employees.[1]

38. It is also reasonable to expect that recent immigrants would be willing to work at lower pay and under poorer conditions as an offset for comfort in the language setting.

39. It is also reasonable for an employer such as O&G to have a preference for employees with experience or a technical background because of its lack of a training program and its desire to promote to skilled jobs from within rather than to incur the expense of advertising for skilled employees.

40. However no explanation is sufficient to overcome the "inexorable zero" employment of blacks at O&G from 1979 through 1985. Given that the statistics of de Vise may be skewed, black availability in the relevant labor market would have to be reduced to three percent in order to get any sort of reasonable statistical probability of zero black hires. Defendant has failed to demonstrate this probability. In fact, anecdotal evidence presented by the EEOC has demonstrated that blacks did apply before 1987 in substantial numbers.

41. The EEOC makes much of the fact that O&G has hired a number of blacks since it filed this suit. The implication the EEOC

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[1]In fact the number of blacks currently working for O&G may through word-of-mouth be partially responsible for the increase in numbers of black applicants currently being experienced by O&G.

wishes to make is that O&G quit discriminating at that time. This implication certainly is strong. However the high percentage of blacks hired may partially be a result of O&G "bending over backwards" to appear to be not discriminating (testimony, Dr. Bloch) or a result of "word-of-mouth" (see fn. 1, infra).

42. In summary, the court finds as a matter of fact that O&G during the period of 1979 through 1985 engaged in a pattern and practice of class discrimination against blacks on account of their race, in both recruitment and hiring for entry level jobs.

Court's Finding Regarding Age

43. Venue in this district is proper under 28 U.S.C. § 1391(b).

44. The charge of discrimination underlying this action provides a proper basis for jurisdiction over the EEOC's class-wide recruitment claim.

45. The court finds however that the EEOC has failed to prove that O&G discriminated on the basis of age. According to the analysis of de Vise O&G hired approximately eighteen percent of employees forty-five or older. He compared this with the percent of those employed in Chicago, Cook County and the SMSA of forty-five and older which was approximately thirty-seven percent. However an analysis of O&G's work force indicates that in June of 1986 over fifty percent of those employed at O&G were over forty-five. There is apparently no statistic available as to the age of those employed in any specific labor market. de Vise's attempt to compare age at hiring at O&G with the age of those employed in the relevant labor market is comparing apples to oranges. The only valid comparison would be between the age of those employed at O&G with the age of those employed in the relevant labor market. Since the number employed at O&G at age forty and older is greater than the age of those employed in the relevant labor market used by de Vise, the statistics suggest that O&G is not in violation of ADEA.

The court so finds.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of this Title VII action. Venue in this Northern District of Illinois Eastern Division is proper. The charge of discrimination underlying this action provides a proper basis for jurisdiction over the EEOC's class-wide recruitment and hiring claim because they were either stated in the charge itself or were developed in the course of reasonable investigation of the charge. All conditions precedent to the institution of this litigation have been fulfilled.

2. This is both a "disparate treatment" and a "disparate impact" case, as to both race and age. Moreover, it is a "pattern and practice" case in that the challenged employment practices respecting recruitment and hiring for low-skilled operative jobs -- mostly punch press and kick press operating jobs -- were "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts," but rather were O&G's "standing operating procedure -- the regular rather than the unusual practice." *Teamsters v. U.S.*, 431 U.S. 324, 336, 52 L.Ed. 2d 396, 97 S. Ct. 1843 (1977); *EEOC v. Chgo. Miniature Lamp Works*, 622 F. Supp. 1281 (N.D. Ill. 1985).

3. Because "the same set of facts giving rise to a disparate treatment case can also be structured to make out a disparate impact case," *Wheeler v. City of Columbus, Miss.*, 686 F.2d 1144, 1150 (5th Cir. 1982), the proof reflected in the court's Findings of Fact is cumulative and establishes O&G's liability under both theories. *See Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 108 S. Ct. 2777, 2787, 101 L.Ed. 2d 827 (1988) ("We conclude...that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases."); *EEOC v. Chgo. Miniature Lamp Works, supra.*

Moreover, the cases which allot the burdens of proof in Title VII cases are equally applicable to age cases brought under the ADEA. *EEOC v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980); *Chern v. Ogden Food Service Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 1547 (E.D.Pa. 1984).

4. Statistical proof relevant in a pattern and practice disparate treatment case involves a showing of significant statistical disparity between the racial composition of the employer's applicant flow, hiring patterns or work force, and the racial composition of the employer's relevant labor market, and is thus "logically different from a *McDonnell Douglas-Burdine* prima facie case." *EEOC v. Chgo. Miniature Lamp Works*, *supra*, at 622 F. Supp. at 1307. Accordingly, in the instant case the EEOC's case was not and could not have been rebutted "merely through articulation of a legitimate, nondiscriminatory reason," but only proof that the EEOC's statistics were inaccurate or insignificant, or by proof of a non-discriminatory explanation for the discriminatory results. *Id.*, 622 F. Supp. at 1307-08. *See Teamsters*, *supra*; *Watson v. Ft. Worth Bank & Trust*, *supra*; *Babrocky v. Jewel Food Co.*, 773 F.2d 857 (7th Cir. 1985); *Mozee v. Jeffboat, Inc.*, 746 F.2d 365 (7th Cir. 1984); *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982); *Vuyanich v. Republic Natl. Bank of Dallas*, 521 F. Supp. 656 (N.D.Tex. 1981); *vacated and remanded on other grounds*, 723 F.2d 1195 (5th Cir. 1984); *Markey v. Tenneco Oil Co., Inc.*, 635 F.2d 497 (5th Cir. 1981); *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 53 L.Ed. 2d 768, 97 S. Ct. 2736 (1977).

5. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed. 2d 158, 91 S. Ct. 849 (1971), and its progeny, the Supreme Court has outlined the progression of proof in disparate impact cases. In *Conn. v. Teal*, 457 U.S. 440, 446-47, 73 L.Ed. 2d 130, 102 S. Ct. 2525 (1982), the court stated:

> "To establish a prima facie case of discrimination [in a disparate impact case], a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the

> employer must demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination."

See Teamsters, supra, 431 U.S. at 349 ([A] prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but nonetheless discriminate in effect against a particular group.") To establish liability under the disparate impact theory the EEOC is not required to prove discriminatory animus, motive, or intent on the part of O&G. *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1014 (2nd Cir. 1980) ("Proof of motive is not required to sustain a claim of disparate impact."); *EEOC v. Chgo. Miniature Lamp Works, supra*, 622 F. Supp. at 1310 ("Discriminatory motive is . . . irrelevant in disparate impact cases."); *Wheeler v. City of Columbus, Miss., supra*. Thus in *Dothard v. Rawlinson*, 433 U.S. 321, 53 L.Ed. 2d 786, 97 S. Ct. 2720 (1977), the Supreme Court stated that "a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed. 2d 280, 95 S. Ct. 2362 (1975). Finally, as noted in *EEOC v. Chgo. Miniature Lamp Works, supra*, 622 F. Supp. at 1310, "Because disproportionate impact is not measured in an individual case but upon a minority group, statistics are naturally the key to getting a disparate impact case off the ground."

6. It is beyond cavil that statistical proof alone is sufficient to establish liability under both the disparate treatment and disparate impact of models. *Watson v. Ft. Worth Bank & Trust, supra*; *Teamsters, supra*; *Mister v. Ill. Central Gulf RR Co.*, 832 F.2d 1427 (7th Cir. 1987); *Shidaker v. Tisch*, 782 F.2d 746 (7th Cir. 1987), *vacated and remanded on other grounds*, 481 U.S. 1001, 95 L.Ed. 2d 195, 107 S. Ct. 1621 *on remand*, 833 F.2d 627 (7th Cir. 1987); *U.S. v. City of Chgo.*, 549 F.2d 415 (7th Cir. 1977); *Payne v. Travenol Labs, Inc.*, 673 F.2d 798 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038, 103 S. Ct. 451-52, 74 L.Ed. 2d 605; *Grant v. Bethlehem Steel Corp., supra*.

7. Further, statistical evidence is sufficient to establish a pattern and practice of discrimination. *Hazelwood School Dist. v. U.S.*, *supra*; *EEOC v. American Natl. Bank*, 652 F.2d 1176 (4th Cir. 1981); *Markey v. Tenneco Oil Co.*, 635 F.2d 497 (5th Cir. 1981). Work force (or EEOC-1) statistical data alone is sufficient to establish liability for periods with respect to which particularized applicant flow and hiring data has not been made available. *Teamsters*, *supra*; *EEOC v. Chgo. Miniature Lamp Works II*, 640 F. Supp. 1291, 1295-96 (N.D. Ill. 1986) ([Although applicant flow and hiring data available only from 1978 until the employer's last hire in 1981, *Chgo. Miniature*, *supra*, 622 F. Supp. at 1319-20,] "EEOC's evidence proved a discriminatory under-representation of blacks in Chicago Miniature's work force throughout the 1970-81 period. That led to the conclusion Chicago Miniature's pattern and practice of discrimination...had continued throughout that period." [emphasis added])

8. Because disparate impact focuses upon the results of facially neutral employment practices, the importance of statistics in establishing liability under the disparate impact model is obvious. On the other hand under the disparate treatment model the necessary degree of purposefulness or "intent" is inferred from the numbers. *See Watson v. Ft. Worth Bank & Trust*, *supra*. This inference is compelled not because Title VII requires a particular balance in an employer's work force or that the work force precisely "mirror" the composition of the relevant labor market but rather because gross disparities between an employer's applicant flow, hiring or work force and its relevant labor market show the existence of discriminatory employment practices:

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the

> composition of a work force and that of the general population thus may be significant even though...Title VII imposes no requirement that a work force mirror the general population."

Teamsters, *supra*, 431 U.S. at 339, n.20 (emphasis added). *See Wilkins v. University of Houston*, 654 F.2d 388, 395 (5th Cir. 1981) ("Where the statistical showing is sufficiently strong in a disparate treatment action, plaintiff's prima facie case can be made without additional evidence establishing that defendant purposefully treated minorities protected under Title VII less favorably than other persons."); *U.S. v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971), *cert. denied*, 404 U.S. 984, 30 L.Ed. 2d 367, 92 S. Ct. 447 (1971) ("In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer.")

9. The EEOC's statistical proof established a prima facie case of race discrimination in recruiting and hiring. The explanations of O&G for this disparity partially but do not completely explain this numerical disparity. The court concludes that O&G has not explained away the "inexorable zero." *U.S. v. T.I.M.E.-D.C.*, 517 F.2d 299, 314-15 (5th Cir. 1975), *vacated* 431 U.S. 324, 52 L.Ed. 2d 396, 97 S. Ct. 1843 (1987). Accordingly, the court finds that the EEOC's proof is sufficient to establish a pattern and practice of racial discrimination in violation of Title VII for the years 1979 through 1985.

10. The EEOC failed to establish that O&G engaged in any age discrimination.

CONCLUSIONS

It is therefore ordered and adjudged that:

1) Defendant O&G is liable for (a) having discriminated against blacks as a class on account of their race in both recruitment and hiring for entry level factory jobs and having engaged in a pattern and practice as such disparate treatment of blacks, and

(b) having established and carried out policies and practices of recruitment as to such jobs that had a disparate adverse impact upon blacks and constituted a pattern and practice of discrimination all in violation of Title VII for the years 1979 through 1985.

2) Defendant O&G is not liable for (a) discriminating against those over forty or forty-five as a class on account of their age in either recruitment or hiring for entry level factory jobs, nor is it liable for (b) having established or carried out any policies or practices of recruitment that had a disparate adverse impact upon those over forty-five as a class on account of age which constituted a pattern and practice of discrimination as prohibited under ADEA.

IT IS SO ORDERED.

\s\

HARRY D. LEINENWEBER, Judge
United States District Court

DATED: DEC 14 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 85 C 9966
	)	Judge Leinenweber
O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The major thrust of defendant's post-trial motion is that the court improperly shifted the burden of proof to defendant to prove that it did not discriminate against blacks in recruitment and hiring. This contention misreads the court's Findings of Fact.

The court did find that the Equal Employment Opportunity Commission's ("EEOC") statistical evidence, although flawed in certain respects, was nevertheless strong enough to overcome O & G Spring and Wire Forms Company's ("O&G") record of zero blacks for eighty-seven hires for the years 1979 through 1985 and five blacks for twelve hires for the years 1986 and 1987. The evidence also included demographic statistics showing at least twenty-three percent black availability for the relevant market during the relevant period. The court found that, due to a variety of reasons (see Findings of Fact Nos. 36-41), the extent of discrimination was partially but not completely rebutted by defendant's evidence. The net result was that O&G's attempt to rebut was legally insufficient. This does not shift the burden of proof to O&G; it only means that the prima facie statistical case presented by EEOC was strong enough to overcome O&G's rebuttal

by a preponderance of the evidence. This is all that is necessary. *Teamsters v. U.S.*, 324, 342, 97 S.Ct. 1843, 1858 (1977).

In order to clarify the matter the court amends Findings of Fact No. 42 to read as follows:

> "42. In summary the EEOC by statistical and anecdotal evidence presented evidence that O&G during the period of 1979 through 1985 engaged in a pattern and practice of class discrimination against blacks on account of race, in both recruitment and hiring for entry level jobs O&G presented. Although O&G presented evidence in rebuttal that its recruitment and hiring practices were dictated by legitimate reasons, the court finds by a preponderance of the evidence that O&G did discriminate against blacks in recruiting and hiring."

The court also amends paragraph 9 of the Conclusions of Law as follows:

> after the word "establish" and before the words "a pattern" the words "by a preponderance of the evidence" is inserted.

The other matters raised by O&G are denied. There is no reason for the court to make separate findings as to the credibility of witnesses. Their credibility is not an issue as such. Their credibility of course may and did affect how the court found certain facts to be.

The court further declines to make specific findings concerning the various aspects of defendant's recruitment and hiring practices. It was the court's finding they collectively discriminated against blacks.

The arguments that the court's ruling amounts to an *ex part facto* (sic) law is meritless.

Finally, the court denies O&G's motion for a new trial.

IT IS SO ORDERED.

\s\
HARRY D. LEINENWEBER, Judge
United States District Court

Dated: May 22, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 85 C 9966
	)	Judge Leinenweber
O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In this Title VII action the court on December 14, 1988, entered Findings of Fact and Conclusions of Law that defendant, O & G Spring and Wire Forms Specialty Company ("O & G"), "(1) be found liable for discriminating against blacks as a class on account of their race in both recruitment and hiring for certain entry level factory jobs which amounted to pattern and practice of disparate treatment of blacks, and (2) be found liable for having established and carried out policies and practices of recruitment as to such jobs that had a disparate adverse impact on blacks which constituted a pattern and practice of discrimination for the years 1979 through 1985." 705 F. Supp. 400 (Findings of Fact and Conclusions of Law, pp. 22-23)

On May 22, 1989, the court denied O & G's motion for a new trial but modified the Findings of Fact and Conclusions of Law to make clear that the Equal Employment Opportunity Commission ("EEOC") had proved a pattern and practice of discrimination on both disparate impact and disparate treatment theories by a preponderance of evidence.

Now O & G has brought the decision of *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), to the court's attention and suggests that the conclusions in this case can no longer stand. The parties have extensively briefed this case, as well as the Seventh Circuit case of *Evans v. City of Evanston*, 881 F.2d 382 (1989) and *Allen v. Seidman*, 881 F.2d 375 (1989), which have offered insight on how to interpret *Wards Cove*. These cases collectively hold that in addition to showing a imbalance between the racial composition of the qualified persons in the labor market and the qualified persons holding the jobs at issue, a plaintiff in disparate impact cases must identify specific employment practices that impact a protected group. Once the plaintiff has done so a burden of production falls on the employer to demonstrate a "legitimate employer purpose" for the suspect employment practice and it is no longer necessary that the practice be "essential" or "indispensable". *Wards Cove*, 109 S. Ct. at p.2126. Once the employer has met this burden of production, the plaintiff must establish by a preponderance of the evidence that either the employer's alleged business justification is a pretext for unlawful discrimination or that alternative practices are available that will achieve the same business ends with less racial impact. *Id.*, at 2125.

With these principles in mind, we shall review the evidence offered in this case. First, although the relevant labor market for O & G was never clearly established by plaintiff (Findings of Fact, Nos. 20-23, 29-31, 36-37, the court found that there were significant numbers of blacks in the labor market serving O & G. (Finding of Fact No. 40) Second, the EEOC established that a specific employment practice, *viz.*, recruitment by word of mouth communicated through its current employees, had a substantial disparate impact on minority employment because a large percentage of its employees were white.[1]. (Finding of Fact No. 16). Third, O & G established several business justifications for its recruitment

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[1]The employees that were not recruited by word of mouth it is agreed were "walk-ins", i.e., were looking for a job and walked in the door and asked for a job or an employment application.

procedure, *viz.*, it cost no money; it produced a high percentage of Polish immigrants with high school technical training which insured O & G of a pool of people that would be willing to work under bad conditions and low pay; it provided people with technical training, while unneeded for the jobs at issue, nevertheless created a pool of employees that could be promoted from within to the more skilled positions without the necessity of a formal training program. (Finding of Fact Nos. 37-39).

The court however ruled that the EEOC had proved disparate impact because "no explanation is sufficient to overcome the 'inexorable zero' employment of blacks by O & G during the years 1979 through 1985". (Finding of Fact No. 40) Thus a fair reading of the court's decision in this regard shows that the court felt that O & G had the burden of persuasion on this issue.[2] Therefore a reconsideration is in order.

Upon reconsideration the court feels that its Findings of Facts show that O & G did establish legitimate business reasons for recruiting workers for its unskilled positions by word of mouth. This practice provided O & G with a ready source of employees who would be willing to work at low pay and under the poor conditions that its jobs offered. Further, the Polish-born workers for the most part had received technical training in school in Poland that served O & G well in providing it with a supply of workers who could graduate to the more skilled positions without having to institute a formal training program or seek outside recruitment.

Therefore, on reconsideration, the court finds that the EEOC did not carry its burden of persuasion on its claim that the specific hiring procedure employed by O & G, namely, recruitment by word

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[2]In the court's order denying O & G's motion for a new trial, the Findings of Fact and Conclusions of Law were modified to include a specific finding and conclusion that the EEOC had established unlawful discrimination by a preponderance of the evidence. However this finding and conclusion was divorced from a consideration of the specific employment practice involved but considered the whole employment picture presented by O & G.

of mouth, did not have a legitimate business purpose or that alternative means were available to achieve the same business ends with less racial impact.

However on the claim of disparate treatment, the court notes that O & G itself claims that a majority of its employees hired during the relevant period were walk-ins off the street. (See Defendant's Memorandum in Response, pp. 3-6). In fact, O & G contends that approximately two-thirds of its hires during the relevant period were obtained in this manner. During this period in question (1979 through 1987) ninety-nine people were hired for the low-skilled positions in question. Of these, only five were black and all of the blacks were hired during the last two years of the relevant period, which was after the EEOC filed this discrimination claim. Findings of Fact Nos. 12 and 14. Furthermore, available applications[3] indicate that at least one-eighth of the applicants were black. (Findings of Fact No. 13) If the word of mouth applicants are factored out, the percentage of black "walk-in" applicants off the street rises to almost 20 percent, near to what Dr. de Vise said was the percentage of the relevant labor market. (Findings of Fact Nos. 19-23) O & G put forth several justifications for its failure to hire a single black walk-in during the period 1979 through 1985. It only hired walk-ins from applications that had been accepted during a two-week "window" period because the type of workers from whom it received application were very transient and it would be a waste of time to work from applications which were stale. The EEOC's labor market statistics were too imprecise to rely on, although its expert, Dr. Glen Meyers ("Meyers"), failed to provide alternative statistics. (Findings of Fact Nos. 29-30).[4] Finally O & G claimed that the blacks who did apply were interested in immediate work only, and when none was available, did not want

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[3]O & G's employment applications are only available for the year 1983 and thereafter. The applications for prior years were legally destroyed.

[4]Meyers felt that the EEOC should have conducted a survey within a five-mile radius of the O & G plant to identify the race of workers who have jobs similar to those offered by O & G.

to fill out applica-tions, but were content to request validation of their unemployment compensation work search forms.

The EEOC responded that its labor market statistics were in fact accurate, and the EEOC provided anecdotal testimony of black persons who in fact had applied to O & G and were turned down. The EEOC also emphasized that once this claim was filed against O & G its employment practices changed: The number of black applicants and hires dramatically rose after the filing of this complaint. Twenty-seven out of one hundred fifty-four applicants were black and five out of twelve hires were black during the years 1986 and 1987. O & G attempted to explain this phenomenon by arguing that the neighborhood had undergone a marked racial change, there was a marked decline in employment in the immediate area, and a flea market opened across the street that drew many black customers.

The court however found that the EEOC's statistical evidence, while not perfect, nevertheless established a profound imbalance between the relevant market and O & G's hires. (Finding of Facts No. 40) In addition, EEOC's statistics certainly meet the minimal requirements of *Wards Cove* by comparing apples to apples. 109 S. Ct. at p.2122. O & G did not offer alternative statistics but was content to rely on its criticism of those offered by the EEOC. *See Allen v. Seidman*, 881 F.2d at 379. The statistical probability using standard deviation analysis of no black hires during the period 1979 through 1985 was infinitesimal. Finding of Fact nos. 25 and 40. The Court finds therefore that the EEOC identified a specific employment practice of O & G, *i.e.*, walk-in hires, which O & G utilized in a discriminatory manner to refuse to hire black applicants. Thus, the EEOC also established causation, *Watson v. Ft. Worth Bank & Trust Co.*, 487 U.S. 977, 108 S. Ct. 2777, 2788 (1988). O & G plainly and simply refused to hire blacks for the unskilled positions. The proof was in the statistical probabilities. As stated in *Wards Cove*,

> "[Where] 'figures for the general population might . . . accurately reflect the pool of qualified job applicants.' *cf.*

> *Teamsters v. United States*, 431 U.S. 324, 340, n.20, 97 S. Ct. 1843, 1856 n.20, 52 L.Ed.2d 396 (1977), we have even permitted plaintiffs to rest their prima facie cases on such statistics as well."

109 S.Ct. at 2121 n.6.

The EEOC's statistics are in fact corroborated by the anecdotal evidence as well as through the actual hiring record of O & G since the filing of the complaint. O & G could have avoided liability in this case if it had hired black walk-ins on the same basis as it hired white walk-ins, as it apparently does today. It strains credulity to argue that not once during the years of 1979 through 1985 did a black walk in at a time that there was a job opening, if in fact two-thirds of all O & G employees were hired in this way. The issue is "whether at the conclusion of the trial the evidence pro and con liability supports a finding of violation." *Allen v Seidman*, 881 F. 2d at 379. The evidence here does reaffirm the court's original Conclusion of Law that O & G engaged in a pattern and practice of disparate treatment of blacks in its hiring practices during the years 1979 through 1986. Therefore O & G's motion to reconsider the court's finding of a pattern and practice of disparate treatment of blacks is denied.

IT IS SO ORDERED.

\s\

HARRY D. LEINENWEBER, Judge
United States District Court

Dated: January 26, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 85 C 9966
	)	Judge Leinenweber
O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The court has before it the motion of plaintiff, Equal Employment Opportunity Commission ("EEOC"), for leave to publish notice of the damage phase of this Title VII pattern and practice race discrimination action in newspapers and other publications to locate possible victims of the discriminatory acts of defendant, O & G Spring and Wire Forms Specialty Company ("O & G").

For the reasons herein stated, the EEOC's motion is granted.

BACKGROUND

After bifurcating the damage and liability issues, on December 14, 1988, the court entered Findings of Fact and Conclusions of Law on the liability phase, finding that O & G was liable for discriminating against blacks in recruitment and hiring for entry level factory jobs under both disparate impact and disparate treatment theories. Subsequently, the court denied O & G a new trial but on January 26, 1990, on the authority of *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989), the court did reconsider and vacate the finding of liability under the disparate

impact theory. The court declined to reconsider liability under the disparate treatment theory so the parties are now at the damage phase of this litigation.

DISCUSSION

The EEOC seeks to publish notice of this action in order that potential victims of O & G's unlawful discrimination may be located. It submits that this information is necessary so that the court may determine the approach it will use to award back pay in this case.

O & G has raised a laundry list of objections to the notice which basically amount to a contention that such notice is premature. It feels that the court should first decide whether back pay ought to be awarded and, if so, the years for which it will be awarded; the sum of money to be awarded; and whether the financial condition of O & G can withstand such an award.

O & G is correct that these issues may well have to be addressed at some point in the damage phase, but it is incorrect when it contends that the information to be gained through publication does not need to be obtained at the outset.

The Supreme Court decided in *Albemarle Paper Co. v. Moody*, 95 S.Ct. 2362, 2373 (1975) that, where unlawful discrimination has been proved, back pay should be denied only for reasons which would not frustrate the statutory purposes of eradicating discrimination and of making persons whole for injuries suffered through unlawful discrimination. Where possible, an individualized remedy should be utilized because "it will best compensate the victims without unfairly penalizing the employer". *Stewart v. GMC*, 542 F.2d 445, 452 (7th Cir. 1976). However, where there is complexity or uncertainty attendant in identifying the persons entitled to back pay as a result of such discrimination, a classwide back pay remedy may be appropriate. *Stewart*, 542 F.2d at 452-54; *Hameed v. Intl. Assn. of Bridges, etc.*, 637 F.2d 506, 520 (8th Cir. 1980). This would be particularly true if the total claims exceed the back pay

liability of O & G. *Hameed*, 637 F.2d at 521 n.19. Such a classwide remedy could involve defining a class of claimants, determining the number of class members, determining the total back pay liability of O & G, and dividing the back pay fund among the class members. *See EEOC v. Chicago Miniature Lamp Works*, 640 F. Supp. 1291, 1300 (N.D. Ill. 1986).

Therefore the issue of the method of back pay distribution needs to be decided at the outset. Such a decision requires that the court determine the number of persons entitled to back pay and, if necessary, define the class of claimants. Then the issue, identified by O & G, will be ripe for decision, that is, whether equity requires the award of back pay under the circumstances present here. *Albemarle*, 95 S.Ct. 2373-74, and *City of Los Angeles v. Manhart*, 98 S.Ct. 1370, 1380-81, both hold that back pay should not be automatically awarded in every case. Since back pay ought not be denied if to do so would frustrate the statutory purposes of Title VII (*Albemarle Paper Co.*, 95 S.Ct. at 2373), it follows that it may be denied if an award itself would frustrate the law. If, for example, an award of back pay might bankrupt O & G, putting all of its current employees black as well as white, out of work, and making it judgment-proof at the same time, discrimination would neither be eradicated nor would persons injured by discriminatory conduct be compensated. *See Seaboard Surety Co. v. Racine Screw Co.*, 203 F.2d 532 (7th Cir. 1953) (courts should exercise discretion in ordering equitable remedies if to do so would endanger the economic survival of the defendant).

It is obvious that for the court to be in a position to make any of these decisions it will be necessary at the outset to determine the number of claimants. In order to make this determination the EEOC must show that individual blacks applied for work at O & G or would have applied in the absence of discrimination. Until the number of alleged victims and the years for which they will claim back pay is known, neither the number of claimants nor the potential liability of O & G can be determined. Thus, it would be impossible at this time to calculate the effect any judgment might have on O & G.

The final issue raised by O & G which would affect the form of the notice concerns the years covered by the proposed notice. The notice suggested by the EEOC seeks to locate blacks who either applied or would have applied to O & G for unskilled work between the years 1979 and 1985. O & G argues that the statute limits an award of back pay to a period of time commencing "two years prior to the filing of a charge with the commission." 42 U.S.C.A. § 2000-5(g). The originating charge was brought by Walter Harris on October 22, 1984. Therefore O & G claims that the EEOC ought to advertise for a period commencing not earlier that October 22, 1982.

However O & G confuses the liability with the back pay accrual period. Persons who can show that they were the subjects of O & G's discriminatory conduct occurring as early as 1979 can be eligible for back pay if the court finds that such persons would have been in the employ of O & G as late as 1983. They would not however be entitled to recover back pay lost for the years 1979 through 1982. *See* Restatement (Second) of Torts § 899(d) (1979); *Thompson v. Sawyer*, 678 F.2d 257, 290; *Albemarle Paper Co.*, 95 S.Ct at 2368 n.3.

Since O & G has raised no other objection to the form of the notice proposed by the EEOC, the form suggested in Exhibit 1 to the EEOC's motion is approved. O & G has also not objected to either the frequency or the specific publications suggested by the EEOC. Accordingly, both are approved.

CONCLUSION

For the foregoing reasons, the motion of the EEOC is granted. The EEOC is granted leave to publish the notice in the form proposed in Exhibit 1 on a weekly basis for three consecutive weeks in the publications listed on Exhibit 2.

IT IS SO ORDERED.

\s\

HARRY D. LEINENWEBER, Judge
United States District Court

Dated: February 26, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 85 C 9966
	)	Judge Leinenweber
O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This court has previously ruled in favor of plaintiff, Equal Employment Opportunity Commission (the "EEOC"), in the liability phase of this Title VII pattern and practice race discrimination action. The matter is now back before the court for rulings on the damage phase. After the parties had briefed the damage phase, but before the court had ruled, the Seventh Circuit handed down its decision in *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d (7th Cir. 1991), which in many respects is factually similar to this case. The court asked the parties to brief the issue of whether Chicago Miniature required any modification of the court's previous rulings in this case. The parties have now done so. After reviewing these briefs, the court will make no change in the Findings of Fact and Conclusions of Law in the liability phase as a result of the decision in *Chicago Miniature*.

Chicago Miniature

In *Chicago Miniature*, as here, the trial court found in favor of the EEOC on a pattern and practice disparate treatment claim based mainly on statistical evidence. The Seventh Circuit reversed the

disparate treatment claim because the EEOC had failed to prove discriminatory intent. The statistics the EEOC relied upon were seriously flawed because they mis-identified the relevant labor market. The district court had concluded that the relevant labor market was the City of Chicago and thus it compared the hiring rates of blacks and non-blacks of Chicago Miniature with the percentage of black entry level workers in the City of Chicago during the relevant periods. Thus, Chicago Miniature was held liable because there was a relatively small percentage of blacks in its applicant pool as compared to the percentage of entry level black workers in Chicago. The appeals court ruled that this analysis was faulty because considerations of "applicant preference" were ignored by the trial court. Interest in the jobs at issue, it held, is an important consideration for proof of a Title VII pattern and practice case. 947 F.2d at 301-302. Specifically, the trial court did not consider commuting distance and language fluency requirements as factors in the relevant labor market. 947 F.2d at 302. The court pointed out that low paying, unskilled jobs were more likely to be filled by those living closer to the site of the job. It also pointed out that Chicago Miniature's lack of an English fluency requirement would make the jobs there especially attractive to certain non-black ethnic groups. 947 F.2d at 302-303.

Here, however, the EEOC did not ignore commuting distances. The EEOC's expert, Pierre de Vise ("de Vise"), relied on statistics, including the percentages of black machine operators in an (sic) one mile radius of O&G Spring and Wire Forms Specialty Company ("O&G"), and in the eight zip codes surrounding O&G, weighted by the percentage of applicants to O&G actually residing in the respective geographic areas. Thus, de Vise was in a position to compare the actual applicants and hires of O&G with the labor market consisting of a geographic area where O&G's applicants and employees actually resided. Also, unlike in *Chicago Miniature*, de Vise used a category of "black machine operators" for comparisons rather than "black civilian workers." 947 F.2d at 303. Further, Chicago Miniature had a record of employing blacks in positions in question which O&G did not have. No matter what the relevant labor market might be determined to be, under all labor markets

testified to had substantial numbers of blacks in them. Finally, this court did in previous orders, and does in this order, take into account the foreign language factor which the court in *Chicago Miniature* did not do. *See* FF No. 37 and *supra*.

Proposed Final Order

The EEOC has filed a proposed final order granting relief. O&G has filed numerous objections to this proposed final order. The court has considered the arguments of counsel on both sides, and the precedent of *Chicago Miniature*, and has determined that it must make some specific findings with respect to the extent of the discrimination and the extent of the wages lost to the discriminates.

The Black Hiring Shortfall

The court was not satisfied with the statistical evidence of either party as it related to O&G's black hiring shortfall. The court found that the jobs in question at O&G were low-skilled kick and punch press operators where past experience, while desirable, was not necessary. (FF No. 10). The court further found that two specific employment practices were responsible for the statistical deviation between O&G's percentage of black employment and that of the relevant labor market. The specific employment practices were recruitment by word-of-mouth and walk-in hires. (Memorandum Opinion, Jan. 26, 1990, p.4) pp.4 and 7). The court found that the EEOC failed to carry its burden of persuasion that O&G's business justification for recruitment by word-of-mouth was pretextual. (Memorandum Opinion, Jan. 26, 1990, p.4) The court, however, found that O&G's walk-in hiring practice, because it resulted in zero black hires, constituted a pattern and practice of disparate treatment and its arguments to the contrary were pretextual. *Id.*, p.7. It was O&G's inability to explain this "inexorable zero" of black employment that sealed its fate in this respect, particularly because many of its hires were walk-ins and not word-of-mouth hires. However, the court did not quantify the exact black employment shortfall due to O&G's pattern and practice of

employment discrimination because such a specific finding was not necessary at the liability phase.

O&G admits, and the evidence justified, the court's finding that approximately two-thirds of the hires during the relevant time period were walk-ins off the street, and approximately one-third of the hires were the products of word-of-mouth recruitment. (Memorandum Opinion, Jan. 26 1990, p.5). Since all punch and kick press operators at the beginning of the period in 1979 were white, in all probability the word-of mouth recruits at the beginning of the period would also be white. However, the walk-in applicants would be expected to mirror the racial makeup of the relevant labor market. The data from the available applications indicate that this was, indeed, the fact. (Memorandum Opinion, p.5). However, had O&G hired black walk-ins as expected, word-of-mouth recruitment would have begun to extend to blacks. In fact, this is what appears to have happened after 1985. (FF No. 40, n.1).

Therefore, the court finds that the statistical evidence should be applied as follows to determine the black hiring shortfall. For the time period in question (1979 through 1985), O&G hired 87 people for the jobs at issue. Approximately two-thirds, or 58, would have resulted from walk-in hires and one-third, or 29, resulted from word-of-mouth recruitment. O&G should have hired blacks from the walk-ins at the rate of 22-1/2 percent (de Vise's most conservative estimation of the number of blacks in the relevant labor market (FF No. 24)). Twenty-two and one-half percent of 58 equals thirteen.

Since blacks would have been gradually added to the O&G work force during this period through non-discriminatory walk-in hiring, black employees would have been expected to participate in the word-of-mouth recruitment as did other employees (and blacks themselves in 1986 and 1987). If blacks had been hired at a uniform rate of 22-1/2 percent during the period of 1979 through 1985 (the period when no blacks were hired), an average of 6.5 blacks would be working in any year (the mean between zero in 1979 to 13 in 1985). Since the average number of employees at

O&G during the years 1981 through 1985 was 47 (FF No. 9), 6.5 blacks would constitute 14 percent of the work force during this period (6.5 divided by 47). Therefore, it follows that 14 percent of the 29 word-of-mouth hires, or 4 hires, should have been black. Therefore, the court finds that the black hiring shortfall for the time period of 1979 through 1985 is 17.

Calculations of Back Pay

The EEOC proposes that the back pay award should be calculated by taking the total value of wages and fringe benefits actually earned by the 87 hires during the period commencing October 22, 1982 through the present, multiplied by the black hiring shortfall percentage. The court and O&G, however, disagree. The EEOC proposal fails to credit O&G with "interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against" as required by Section 706(g).

The EEOC's proposal apparently assumes that none of the discriminatees would have been able to get work elsewhere during the period in question. The EEOC's own employment and unemployment figures contradict this. The court believes that a proper credit for O&G can be determined with reasonable approximation, without conducting the individualized hearings demanded by O&G, by utilizing the average black unemployment rate for the relevant labor market during the back pay period. This would assume that each of the discriminatees would suffer unemployment during the period of discrimination equal to that of the class.

The percentage unemployment rate for a class means that at any one time that percentage of the class is unemployed, or stated another way, the class members are unemployed a percentage of the time equal to the black unemployment rate. This should not be unfair to the class because the entry level wages and fringe benefits offered by O&G are so close to the very bottom of the economic barrel that the chances that a discriminatee would have obtained substitute employment at wages higher than that offered by O&G is quite high. Say the average unemployment rate for the class was 20

percent, during the back pay period the award should be equal to 20 percent of the EEOC's figure, i.e., the total wages of the 87 hires times the black shortfall percentage times 20 percent.

If the court would proceed to identify each of the discriminatees as urged by O&G, of course the credits could be determined with greater accuracy. However, the EEOC has asked the court to eschew identification of individual claimants (with good reason) in favor of a class-wide recovery with a pro rata distribution of the damages to members of the class. The court agrees that 450 claimants for 17 spots makes a pro rata distribution without individual determinations preferable (see below). But this makes precise determination of the credits impossible.

Pro Rata Distribution

Because of the large number of applicants (451 for 17 spots) responding to the published notices compared to the available employment opportunities, the EEOC urges the court to order a pro rata distribution to the class of claimants. O&G, not surprisingly, urges the court to engage in a case-by-case method of the determination of the proper claimants. The court sides with the EEOC for the reasons stated in *EEOC v. Chicago Miniature Lamp Works*, 640 F. Supp. 1291 (N.D. Ill. 1986), reversed on other grounds 947 F.2d 292 (7th Cir. 1991). Here, as in *Chicago Miniature*, the entry level jobs at issue required only minimal qualifications. (FF No. 10). So it cannot be said with certainty which individuals would have been hired absent discrimination. Individual entitlement hirings would be a "quagmire" in which guesswork would predominate and pinpointing of actual discriminatees would be practically impossible. The court will, therefore, order pro rata distribution of the money award.

Prejudgment Interest

The EEOC asks for prejudgment interest compounded monthly from the period from October 22, 1982 to the date judgment is entered in this case. Prejudgment interest is a normal incident of relief in Title VII cases. *Loeffler v. Frank*, 486 U.S. 549, 108 S.

Ct. 1965, 1971, 100 L.Ed. 2d 549 (1988); *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 819 (7th Cir. 1990). In fact, O&G does not raise an objection. The court does order prejudgment interest, but compounded annually rather than monthly for convenience sake. The interest rate is to be the IRS adjusted prime rate. *EEOC v. O'Grady*, 857 F.2d 383 (7th Cir. 1988).

Hiring of Discriminatees

The EEOC asks the court to order O&G to hire 20 black persons over the period of the next four years pursuant to suggested procedures. O&G insists that it should only be made to hire those who applied during the window period, and have either technical training or previous spring company experience. However, under the procedures suggested by the EEOC, O&G is given free rein to compile a list of acceptable employees from the 451 applicants so long as it does so on a non-discriminatory basis.

However, the court feels that the number to be hired should be 17, the shortfall number found by the court, less the number of blacks hired by O&G since 1985 in excess of the percentage of blacks in the relevant labor market. Assuming O&G has bent over backwards to hire blacks since the EEOC filed this suit, as the EEOC and the court believe (FF No. 41), this means that O&G has been discriminating in favor of blacks and against whites. The non-black labor market should not be further penalized.

Other Provisions

The court approves of the other provisions of the proposed final order granting relief submitted by the EEOC.

CONCLUSION

The parties are directed to present evidence of the average unemployment rate for blacks in the relevant labor market for the period from 1982 to the present for purposes of calculating the back

pay award in accordance with this Memorandum Opinion. The case is set for status on Tuesday, April 21, 1992 at 9:00 a.m.

IT IS SO ORDERED.

\s\
HARRY D. LEINENWEBER, Judge
United States District Court

Dated: March 20, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 85 C 9966
	)	Judge Leinenweber
O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On March 20, 1992, this court determined the black hiring shortfall of defendant, O & G Spring and Wire Forms Specialty Company ("O&G"), for the period of 1979 through 1985 to be 17. Memorandum Opinion and Order, Mar. 20, 1992 ("Order"), p.6. The Equal Employment Opportunity Commission ("EEOC") had proposed that the back pay award for the discriminatees be calculated by taking the total value of wages and fringe benefits actually earned by the 87 hires during the period commencing October 22, 1982 through the present, multiplied by the black hiring shortfall percentage. The court, however, held that such a figure would fail to credit O&G with the interim earnings, or those earnable with reasonable diligence required by Section 706(g). (42 U.S.C. § 2000e-5(g)). Order at 6-7.

This was a problem because, due to the large number of applicants (451), and a perceived difficulty in determining which among them would have been hired absent discrimination, the EEOC had urged the court to order prorata distribution to the claimant class. However, without individual hearings, the actual credits could not be determined. The court agreed with the EEOC

of the need to avoid the "quagmire" of individualized hearings, and sought to solve the interim earnings credit due to O&G by allowing a credit based on the percentage of time that the blacks were employed in the relevant labor market during the period in question, i.e., 100 percent, minus the black unemployment rate. The court asked the parties to attempt to agree on the relevant unemployment rate. The parties have done so, agreeing on an unemployment rate of 22 percent.

The EEOC has proposed a revised recommendation concerning back pay to be the awarded the claimant class. Under its revised calculation, the back pay award, including pre-judgment interest, equals the figure first recommended, multiplied by the agreed black unemployment rate of 22 percent, or $ 378,754, which included $ 87,380 in fringe benefits.

O&G has filed objections to the EEOC's revised calculations. First, it contends that the back pay should be limited to the period of discrimination, *i.e.*, the period of 1982 through 1985. It argues, without citing any authority, that the damage rule applicable to an individual disparate treatment case should not apply to a pattern and practice case. The court, however, agrees with the EEOC that there is no reason to apply a different rule. If the court were to conduct the individualized hearing and determine the individuals discriminated against urged by O&G, the damages would be calculated by deducting interim earnings from wages lost from the date of discrimination through the present. In would matter not one whit that O&G might have hired only blacks after the date of the discriminatory act. The discriminatees had been discriminated against and are entitled to damages. There is no reason to adopt a different rule where there is to be a prorata distribution to a class. The benefit to O&G by changing its policy of discriminating against blacks was to close off the class of beneficiaries as of the date of the end of the discrimination, which was the end of 1985.

Next, O&G argues that the court ought not award prejudgment interest. However, the Seventh Circuit has ruled that prejudgment interest is a normal incident of relief for a Title VII violation.

EEOC v. Gurnee Inn Corp., 914 F.2d 815, 819 (7th Cir. 1990). The court sees no reason to depart here.

O&G makes the additional argument that it cannot afford to pay any judgment in excess of $ 80,000, and if the court adopted O&G's calculations, this result would be accomplished. However, the evidence is certainly equivocal on this point and the court by no means believes that O&G is without the ability to pay the full damages. It is up to the EEOC to collect, and if O&G sincerely cannot pay, the EEOC will be unable to collect.

O&G also objects to the awarding of 15 percent of lost pay as fringe benefits. However, fringe benefits are properly included in awarding Title VII relief. *Meadows v. Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975), *cert denied*, 96 S. Ct. 2215, 425 U.S. 998. Fifteen percent was within the evidence.

The court, therefore, adopts the EEOC's calculation of back pay owed to be $ 378,754.

The EEOC is charged with redrafting its proposed judgment order reflecting the revisions previously ordered on by the court on March 20, 1992, and those adopted in this order. The order should be presented to the court on the 28th of July, 1992, at 9:00 AM.

IT IS SO ORDERED.

\s\
HARRY D. LEINENWEBER, Judge
United States District Court

Dated: July 2, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 85 C 9966
	)	Judge Leinenweber
O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,	)	
Defendant.	)	

FINAL ORDER GRANTING RELIEF

THE LITIGATION

1. In this action by Plaintiff Equal Employment Opportunity Commission (the "Commission" or "EEOC"), an agency of the United States, against Defendant O&G Spring & Wire Forms Specialty Company ("O&G"), the Commission alleged violations of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"). Specifically, the Commission alleged that O&G had engaged in a pattern and practice of discrimination against Blacks on account of their race in recruiting and hiring for plant jobs. The Commission sought relief, including backpay and appropriate injunctive measures, to correct these alleged violations.

FINDINGS

2. In its Orders of Dec. 14, 1988, May 22, 1989 & January 26, 1990, this Court found, inter alia, that:

A. O&G engaged in a pattern and practice of disparate treatment of blacks in its hiring practices during the years 1979 through 1985.

B. During the six-year period from 1979 through 1985 O&G hired 87 persons as punch press or kick press operators, of whom none were black.

C. The significant contrast between the availability of blacks for the punch press and kick press jobs at O&G when compared with the "inexorable zero" representing O&G's black hiring rate for those jobs between from 1979 through 1985 could not be explained away.

D. Past experience is desirable but not necessary for the punch press and kick press jobs at O&G.

E. EEOC's evidence included demographic statistics showing that Blacks comprised at least 23% of the persons in the relevant labor market for the jobs at issue in this case from 1979 through 1985.

3. Based on the pleadings and record, this Court further finds:

A. Persons who are class members in this action as defined in Paragraph 4C are entitled to back pay and/or job offers from O&G pursuant to Paragraphs 17-27 of this Order Granting Relief (the "Order").

B. O&G shall pay up to a total of three hundred seventy eight thousand seven hundred and fifty four dollars ($378,754.00) to class members who are entitled to backpay, and the backpay should be distributed on a pro rata approach, pursuant to Paragraphs 17-23 of this Order.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

COVERED FACILITY

4. This Order applies to O&G's facilities at 4417 West Division in Chicago, Illinois, any addition to those facilities, and any facility, located in the Chicago Standard Metropolitan Statistical Area ("SMSA"), built or acquired as a replacement or addition to that facility. The provisions of this Order shall also apply to any successor of O&G which operates the facilities at 4417 West Division or any facility located in the Chicago SMSA built or acquired as a replacement for or addition to the 4417 West Division facility.

DEFINITIONS

5. For the purpose of this Order, the following definitions shall apply:

A. "Plant positions" shall refer to punch press and kick press positions at O&G's covered facility as described in Paragraph 4.

B. "Claimants" shall refer to individuals who have submitted a claim form in the form of Exhibit 1 attached hereto to the EEOC.

C. "Class members" shall refer to Black individuals whom, pursuant to the procedures set forth in Paragraphs 10-15 of this Order the Court determines are entitled to backpay awards from O&G and/or consideration for employment by O&G.

INJUNCTIVE RELIEF

6. In all matters arising from or relating to employment, including, but not limited to hiring, O&G and its officers, agents, employees, successors, and assigns, and all of those in active concert or participation with them or any of them, shall comply with Title VII and shall not discriminate on the basis of race. In particular, O&G is enjoined from engaging in any employment practice which discriminates against any individual on the basis of race, including, but not limited to:

A. failing or refusing to hire any individual because of race;

B. maintaining any hiring practices or policies which would deprive or tend to deprive any individual of employment opportunities because of such individual's race.

NON-RETALIATION

7. O&G, its officers, agents, employees, successors, assigns, and all those in active concert or participation with them, or any of them, shall not engage in reprisal or retaliation of any kind against any person because of such person's opposition to any practice made unlawful under Title VII, because of such person's filing a charge, testifying or participating in any manner in any investigation, proceeding or hearing under Title VII, because such person was identified as a possible witness for the EEOC in this action, because such person received relief in accordance with this Order, because such person participated in any manner in this action or in the investigation giving rise to this action, or because such person asserted any rights under this Consent Decree.

MONETARY RELIEF

8. As provided herein, O&G shall make or cause to be made payments equalling a total of three hundred seventy eight thousand seven hundred and fifty four dollars ($378,754.00) for distribution to class members. Such payments shall be made exclusively for the benefit of and distribution to class members. By no later than October 9, 1992, O&G shall deposit the sum of three hundred seventy eight thousand seven hundred and fifty four dollars ($378,754.00) into an interest-bearing escrow account maintained by O&G at (The Northern Trust Company) (the "Escrow Account").

9. Interest earned on amounts deposited by O&G into the Escrow Account shall be distributed to class members. There shall be no revision of any funds to O&G.

IDENTIFICATION OF CLASS MEMBERS

10. Within fifteen (15) days of date of this Order, the EEOC shall submit to O&G all claim forms in the form of Exhibit 1 which EEOC has received from persons who (a) actually applied to O&G and for whom O&G produced an employment application, or (b) contacted the EEOC pursuant to a notice concerning this action which was published pursuant to Court approval in the Chicago Sun-Times, Chicago Tribune, and the Chicago Defender prior to the entry of this Order, and which invited black persons who applied to O&G between 1979 and 1985 to contact the Chicago District Office of the EEOC.

11. Within ninety (90) days after O&G receives the claim forms pursuant to Paragraph 10, and based on its review of the claim forms O&G receives from the EEOC, O&G shall submit to the EEOC a list of recommendations as to the disposition of each claim. Such list shall identify by name, address, and social security number: (a) all persons who returned claim forms and who O&G believes are class members eligible for backpay awards and/or hiring consideration by O&G; and, (b) all persons who returned claim forms and who O&G believes are not class members eligible for backpay awards and/or hiring consideration by O&G, along with a specific explanation as to why O&G believes each such person is ineligible. Reasons for ineligibility may include, but shall not be limited to, the following: (a) the claimant is not Black; (b) the claimant states that he or she did not actually apply or attempt to apply for a job at O&G between 1979 and 1985; (c) the claimant was not at least 18 years of age at the time the claimant claims he or she applied for a relevant job at O&G; (d) the claimant's claim form is so incomplete, illegible, or otherwise inadequate that it is not possible for the parties to make a favorable determination as to the merits of the claim; (e) the claimant's claim form does not include a social security number; or (f) the claimant is or has been, at any time since October 22, 1984, an employee of the EEOC or of counsel for O&G.

12. A claimant will not be deemed ineligible for back pay and/or job offers solely on the basis that (a) he or she did not have kick press or punch press experience or experience operating machines prior to applying, or (b) the claimant did not apply for a job at O&G during the two or three-week period before O&G filled a job opening.

13. Any person whose completed claim form was not actually received by the EEOC on or before December 31, 1990 shall be deemed ineligible to receive and forever barred from receiving any monetary relief, any job offer, or any other relief in connection with this case and his or her claim shall be automatically extinguished without further action or deed by any person.

14. Within sixty (60) days after receipt by EEOC of the list described in Paragraph 11, EEOC and O&G shall meet and attempt to resolve any disputes regarding the eligibility of persons who submitted claim forms in this case. Any disputes regarding eligibility which EEOC and O&G are unable to resolve between themselves shall be submitted to the Court.

15. Upon resolution of all disputes between EEOC and O&G pursuant to Paragraph 14, EEOC and O&G shall generate and submit for the Court's approval a list of class members who are eligible for relief and a list of persons who are not eligible for relief. The list of ineligible claimants shall include a brief summary statement of the reason(s) each such claimant was determined not to be eligible for relief. At the same time, O&G shall give written notice to each claimant who appears on the list of persons who are not eligible for relief of his or her ineligibility and a statement of the reason the claimant was determined not to be eligible for relief. The written notice shall advise each claimant of the date and time upon which the claimant may appear before this Court to object to the finding of ineligibility.

16. Once the Court has approved the lists described in Paragraph 15, no persons eligible or ineligible status shall thereafter be changed. If a class member dies at any time after the Court's approval of the list of class members but before the issuance of checks to class members, the estate, personal representative, or heir of that class member shall, upon the Court's approval, receive the backpay checks which the class member would otherwise have received.

BACKPAY AWARDS TO CLASS MEMBERS

17. Within thirty (30) days of the Court's approval of the lists described in Paragraph 15, O&G shall issue to each class member

(or his/her estate, personal representative, or heir, pursuant to Paragraph 16 of this Order) a check which represents an equal, pro-rata share of the amount in the Escrow Account and less all legally required tax deductions which O&G shall cause to be deposited with the appropriate governmental agency.

18. O&G shall mail the checks to the class members at their last known addresses by first class, certified mail. O&G shall have responsibility for preparing, processing, and mailing checks to class members. O&G shall pay all expenses associated with the implementation of this Order, including but not limited to mailing of notices and distribution of funds to class members.

19. Within five (5) days of issuing the checks to the class members, O&G shall certify to the EEOC that it has distributed all of the funds in the Escrow Account pursuant to Paragraphs 17 and 18 of this Order. At the same time, O&G shall provide the EEOC a list containing the name of each person who was issued a check, the date the check was issued, and the amount of the check.

20. The total amount of the checks received by any individual class member shall not exceed ten thousand dollars ($10,000.00). Amounts available for distribution to class members which would cause any class member to receive more than $10,000.00 shall not be distributed to such class members pursuant to Paragraphs 17 and 18, but instead shall be disposed of in accordance with Paragraph 22 of this Order.

21. Three (3) months after the issuance of the checks pursuant to Paragraphs 17 and 18, O&G shall cause payment to be stopped on all checks mailed which have not then been paid and shall cause all checks previously mailed but returned as undeliverable to be cancelled (provided, however, that, if a person whose check has been returned as undeliverable contacts O&G within three (3) months of the issuance of checks pursuant to Paragraph 14 with a new mailing address, then O&G shall not cancel the check but shall mail the check to the person at the new mailing address). The funds evidenced by such stopped and cancelled checks shall remain in the Escrow Account and shall be disposed of in accordance with Paragraph 22 of this Order. Any person whose check was returned as undeliverable and cancelled or whose check was not paid prior

to the placement of the stop payment order shall have no right to receive the funds evidenced by said check and shall thereafter be ineligible to receive and forever barred from receiving any monetary relief.

22. Any amounts which remain in the escrow account five (5) months after the issuance of checks pursuant to Paragraphs 17 and 18 has been made and which reflect either: (1) checks which have not been cashed by class members and which, pursuant to Paragraph 21, O&G has cancelled or caused payment to be stopped upon; or, (2) amounts which would have been payable to class members in the absence of the limitation set forth in Paragraph 20, subject to the approval of the Court, shall be distributed as agreed by the parties or paid to a not-for-profit institution jointly designated by the EEOC and O&G, and at least one of the purposes or effects of such institution's receipt of funds shall be to foster or facilitate equal employment opportunities. Under no circumstances will any amounts deposited by O&G into the Escrow Account pursuant to Paragraph 9 of this Order revert to O&G.

23. In the event that O&G issues a check to a not-for-profit institution pursuant to Paragraph 22, then within ten (10) days after issuing the check, O&G shall certify to the EEOC that the check has been issued.

HIRING OF CLASS MEMBERS BY O&G

24. Within thirty (30) days of the Court's approval of the lists described in Paragraph 15, and based upon its review of each claimant's claim form (Exhibit 1), O&G shall provide to the EEOC a list of class members entitled to consideration for a job offer in a plant position. Such list shall include the class member's name, current address, and social security number.

25. For the four-year period following the date of this Order, O&G shall hire persons from the list of class members entitled to job consideration according to the following:

A. For plant positions which O&G fills, O&G shall hire (approximately alternately) from current applicants from the general public and from the list of class members

entitled to consideration for plant openings, such that, at the end of each three-month period following the date of this Order, the number of class members who have been hired into plant positions equals or exceeds the number of current applicants from the general public who have been hired into plant positions.

B. The hiring sequence set forth in Paragraph 25A shall continue until any of the following occurs: (1) four (4) years after the date of this Order have passed; (2) all class members eligible for consideration for plant job openings have received job offers for plant positions and have either rejected (as defined in Paragraph 25C of this Order) or accepted such offers; or, (3) O&G has hired (as defined in Paragraph 25D of this Order) twelve (12) class members for plant positions.

C. If a class member entitled to consideration for a job is offered a job and is interested in the job but unable to accept the job at the time it is offered, that class member shall not be removed from consideration for employment in the future, provided, however, that any class member who rejects a second offer shall be removed from the list of individuals eligible to receive job offers. If a class member entitled to consideration for a job states, either orally or in writing, that he or she is not interested in employment pursuant to this Order at the time the job is offered and is not interested in employment at O&G at a future time, that class member will be deemed to have rejected the offer, and O&G will no longer have any obligation under this Order to offer employment to the class member.

D. A class member will be deemed to have been hired by O&G if the class member is offered and accepts a job at O&G and the class member appears for and begins work at O&G for at least eight (8) hours.

E. In determining whether a particular claimant is qualified for a particular job opening under this Order, O&G shall apply the same legitimate, nondiscriminatory

standards which it would use to determine whether any applicant would be qualified for the job opening.

F. It shall be within O&G's discretion to determine the order in which it offers jobs to class members as long as it does so in a non-discriminatory manner consistent with its obligations under the law and this Order.

26. The procedure for offering jobs to class members and for confirming acceptance or rejection shall be as follows:

A. Job offers may be made orally or in writing. All such offers shall state the position offered, the hours of work, the wage rate, and the level of benefits and the day to report for work. All such offers will remain open for five (5) days. Job offers made orally shall be memorialized in memoranda to be retained by O&G for at least four (4) years after the date of this Order.

B. O&G shall confirm each class member's acceptance or rejection of an offer in writing, which shall be sent by certified mail return receipt requested. Confirmations shall be dated and shall indicate whether the class member accepted or rejected the offer. If the class member rejected the job offer, O&G shall state whether the class member wished to be considered for future job openings at O&G. O&G shall mail a copy of each confirmation to the Commission on the date that the confirmation is sent to the class member.

27. A class member hired pursuant to this Order shall receive seniority credit calculated as of the date he or she actually applied for employment at O&G. Each class member who accepts a job offer shall receive seniority credit for the purpose of determining the following:

A. wage rate;

B. vacation and sick leave;

C. pension benefits;

D. lay-off and recall;

E. all other benefits provided by O&G to employees of which are affected by an employee's date of hire.

HIRING PRACTICES

28. O&G shall hire for plant jobs in a non-discriminatory manner.

29. At such times as O&G is or contemplates that it will soon be hiring for plant positions, O&G shall accept and retain applications from any individual who wishes to be considered for employment in a plant position.

30. O&G is not required by this Order to accept applications for employment at times other than when it is or contemplates it will soon be hiring. However, whenever O&G accepts applications, O&G shall inform all applicants, at the time the application form is submitted to O&G, of any requirement O&G may maintain for periodic renewal of the application in order to remain eligible for consideration for employment, and O&G shall consider all applications that remain current under that requirement when filling a vacancy.

RECORD-KEEPING

31. O&G shall maintain and keep available for inspection and copying by the Commission the following records:

A. All applications and other supporting materials submitted by persons seeking employment at O&G.

B. Records of hiring for each vacancy for plant positions at the plant, including but not limited to records identifying the name and race of each person hired into such vacancy.

C. All documents created, maintained, or utilized by O&G in performing or administering this Order.

D. Any other materials the preparation or maintenance of which is required by this Order.

E. All other records or materials which O&G is required to maintain by the EEOC's regulations.

32. O&G shall make all records referred to in Paragraph 31 available for inspection and copying by EEOC within a reasonable time (not to exceed 21 days) after the Commission so requests. For the purpose of allowing EEOC to verify O&G compliance with this Order, O&G shall make available any agents and/or employees whom the Commission reasonably asks-to interview. EEOC shall also have the right to enter the premises of O&G upon reasonable notice in order to determine O&G's compliance with this Order.

REPORTING

33. Every three (3) months for four (4) years after the date of this Order, and for purposes of determining O&G's compliance with Paragraph 25 of this Order, O&G shall provide EEOC with records regarding its hiring of class members and other persons into plant positions, including records which show the name, race, date of hire, job title, and wages at hire of each person hired into a plant position. O&G shall also provide EEOC with such other reports and materials as EEOC may reasonably request.

POSTING OF NOTICE

34. Within thirty (30) days of the date of this Order, O&G shall give to each employee of O&G who is then involved in interviewing, screening or hiring persons for plant jobs a copy of the Notice attached as Exhibit 2. At the same time, O&G shall conspicuously post a copy of the Notice in a location or locations readily accessible to and commonly frequented by O&G employees and applicants for employment. The Notice shall remain posted for four (4) years after the date of this Order. O&G shall certify to EEOC within thirty (30) days of the date of this Order that the Notice has been properly posted.

COMPLIANCE AND DISPUTE RESOLUTION

35. In the event that the Commission believes that O&G has failed to comply with any provision of this Order, the Commission shall notify O&G in writing of such non-compliance and afford O&G ten (10) days to remedy the non-compliance or to satisfy the EEOC that there has not been any non-compliance. If O&G has not remedied the alleged non-compliance within ten (10) days, or satisfied the EEOC that there has been none, the Commission may apply to this Court for any appropriate order to enforce the provisions of this Order.

DURATION OF ORDER AND RETENTION OF JURISDICTION

36. All provisions of this Order shall be in effect for a period of four (4) years.

37. For the duration of this Order, this Court shall retain jurisdiction for the purpose of enforcing the provisions of this Order.

COSTS OF ADMINISTRATION AND IMPLEMENTATION OF ORDER

38. O&G shall bear all costs associated with its administration and implementation of this Order.

COURT COSTS AND ATTORNEYS' FEES

39. The EEOC is a prevailing party in this action. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, the EEOC may recover its costs from O&G. The EEOC shall file a bill of costs as required by the Federal Rules of Civil Procedure.

MISCELLANEOUS PROVISIONS

40. When this Order requires the submission by O&G of reports, notices, or other materials to the Commission, such materials shall be mailed to: EEOC v. O&G, Mary B. Manzo, Equal Employment Opportunity Commission, Chicago District Office, Legal Division, 536 South Clark Street, Room 982, Chicago, Illinois 60605.

41. O&G will provide any potential successor with a copy of this Order within a reasonable time prior to the conclusion of negotiations for acquisition or assumption of control of the plant, and shall inform EEOC if it is about to be succeeded by any other entity or about to undergo any other change in corporate structure.

42. O&G and its successors shall assure that all their officers, managers, and supervisors observe the terms of this Order.

43. This Order shall be binding upon and enforceable against O&G and its respective successors and assigns.

Dated: AUG 19 1992

\s\
HARRY D. LEINENWEBER, Judge
United States District Court

EXHIBIT 1 Claim Forms Not Reprinted

Exhibit 2

NOTICE TO ALL EMPLOYEES AND APPLICANTS FOR FACTORY JOBS AT O&G SPRING & WIRE FORMS SPECIALTY COMPANY

This notice is being posted by order of the Court in a lawsuit brought against O&G Spring & Wire Forms Specialty Company ("O&G") by the United States Equal Employment Opportunity Commission ("EEOC"). The case, entitled *EEOC v. O&G Spring & Wire Forms Specialty Company* Case Number 85 C 9966, was filed in the United States District Court for the Northern District of Illinois. In the suit, EEOC asserted that O&G engaged in discrimination against Blacks in hiring for factory jobs. The Court has found that O&G discriminated against Blacks in hiring for factory jobs from 1979 through 1985. The Court has ordered O&G to:

1. Not discriminate on the basis of race in hiring for factory jobs at O&G;

2. Not retaliate against any person who participated in this lawsuit, who files a charge of discrimination with EEOC, or who participates in any EEOC investigation; and,

3. Pay a sum of money and/or offer jobs to eligible Black individuals who in the past had applied for factory jobs at O&G.

Federal law prohibits employers from discriminating against any applicant or employee on the basis of race, color, religion, sex, national origin, or age. O&G's employees must personally ensure that their own conduct does not discriminate against any job applicant or employee on the basis or race, color, religion, sex, national origin, or age.

Should you have any complaints of discrimination, you can contact the EEOC at the address given below. EEOC charges no fee for their services and has employees that speak languages other than English.

_____
Harry D. Leinenweber
United States District Judge

Dated:_____

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted as ordered by the Court for four (4) years from the date shown above and must not be altered, defaced or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the U.S. Equal Employment Opportunity Commission, Chicago District Office, Room 982, 536 South Clark Street, Chicago, Illinois 60605.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 85 C 9966
	)	Chicago, Illinois
O & G SPRING AND WIRE FORMS SPECIALTY COMPANY,	)	November 23, 1992 (:00 o'clock a.m.
Defendant.	)	

TRANSCRIPT OF PROCEEDING
BEFORE THE HONORABLE HARRY D. LEINENWEBER

THE CLERK: 85 C 9906, EEOC vs. O & G Spring.

MR. SMETANA: Good morning, your Honor. Gerard Smetana for O & G Spring.

MS. MANZO: Good morning, your Honor. Mary Manzo for the EEOC.

MR. SMETANA: Your Honor, this is our motion for leave to seek attorney's fees and costs on the age discrimination question of the case and for leave to file an amended motion and application. We inadvertently left out some of Mr. Levenfeld's time on the initial document. We have corrected that and attached copies of all detail on the attorney's fees and also filed a memorandum in support with the application.

Basically, if your Honor recalls, in this case we prevailed in the age discrimination of the case. There was absolutely no basis for them proceeding with the age discrimination question. That was a long time ago. What we are asking for in the nature of this order is, essentially, one-third of the attorney's fees expended. We have not and do not think it would be fruitful to divide and go into detail.

Because-we attempted that once in trying to sort out which hours for a portion of the age. We think a one-third portion is fair given the fact that the age was, really, about half the case.

MS. MANZO: Your Honor, may I respond?

THE COURT: Yes.

MS. MANZO Your Honor, in order for the Court to award fees and costs under the Equal Access to Justice Act the Court must find that the government was not substantially justified in bringing its age claims. In this case at trial we relied on three types of evidence to establish the age claim. One was admission by defendants on two separate occasions that they wanted to hire younger persons. The other evidence was testimony from three applicants who were over the age of forty-five, who applied and were not hired. The last bit of testimony related to statistical evidence which this court rejected and relied upon primarily in finding against the EEOC on the age claim.

We think the claim was substantially justified. Therefore, we ask the Court to dismiss the motion.

MR. SMETANA: You want to hear the argument, your Honor, I guess.

This is a classic case. Your Honor himself found on the question of age here that the proof they presented was apples and oranges.

This company from the beginning, if they had bothered to look at the records on this persistent claim, hired far in excess, in terms of the numbers of persons --

THE COURT: If I remember right, I was amazed at the testimony. But didn't de Vise support your position? I mean, I was amazed. I didn't find him at all persuasive and neither did I find your evidence persuasive.

MS. MANZO: Your Honor, the statistical evidence was just one part of the case. We had admissions from the company officials that they wanted to hire younger persons. They tried to explain away that testimony but we were justified in bringing up that testimony and pursuing the action based on that testimony.

THE COURT. Did de Vise support your position?

MS. MANZO: Yes, he did, your Honor.

MR. SMETANA: I do not recall that, your Honor.

THE COURT: To my recollection he did, which cast a pale light on all of his testimony.

MS. MANZO: Your Honor, the problem was that he compared the availability. He used a percentage of persons employed in jobs rather than the persons who were unemployed.

THE COURT: The fact that you did have a person who was, apparently, well thought of in the field that would support it -- and I do remember that he did and I didn't find his testimony at all persuasive -- I don't find that the making of the claim was such that would entitle the defendant to fees. So, I am going to deny the fees. I also would point out that in no way would the time consumed on preparing this case have anywhere approached one-third. There was an awful lot that went on -- I don't know if you are saying a third up to the findings of liability --

MR. SMETANA: Up to the time of your decision in '88, nothing since that time, your Honor.

MS. MANZO: Your Honor, that totals over S94,000.

MR. SMETANA: I know. But the client has spent over $400,000. So, really, it's a small number given the total expenditures.

THE COURT: I am going to deny the claim for fees under the Equal Access to Justice.

MS. MANZO: Thank you, your Honor.

Your Honor, there is one point. When the Court entered the final judgment on August 19th, 1992 we did not get a signed copy of the notice that O & G is supposed to post at its plant. Could we get a signed copy and have it ready?

MR. SMETANA: On that subject, your Honor, without going through the substance of the motion --

THE COURT: You mean I didn't sign it?

MS. MANZO: Your Honor, it was attached to the final judgment but we failed to note that it was not signed.

THE COURT: You mean I was supposed to sign it?

MS. MANZO: Yes, your Honor.

THE COURT: Okay, I'll sign it.

MR. SMETANA: I have no problem with your signing it. My question, your Honor, is whether we can hold in suspension the posting of the notice until the appeal

THE COURT: Have you posted the unsigned notice?

MR. SMETANA: No, nothing has been posted yet, your Honor. We filed a notice of appeal.

MS. MANZO: Your Honor, no sign was noticed but they are required to post it.

THE COURT: All right. Send it up and I will sign it.

MR. SMETANA: My suggestion, your Honor, is, since we have appealed the decision -- there is a way to take care of funds that we have paid, you know, in an escrow account, which we have agreed to do by agreement. But there is no way to undo a notice suggesting to persons that we violated the law when we believe we have not.

THE COURT: Well, again, my recollection is that there was an agreed stay up to whatever it was. It was by agreement. So, I am going to require that you live up to the agreement unless you wish to agree otherwise

MS. MANZO: No, your Honor, we do not.

THE COURT: Whatever the agreement provides, go ahead and carry it out. I am not going to review the agreement at this time. I don't think I, probably, have authority to do so. It is on appeal. So, anyway, I do have authority, obviously, on the fee issues. Anyway, motion denied.

MS. MANZO: Thank you, your Honor.

MR. SMETANA: Thank you, your Honor.

(Which were all the proceedings had in the above entitled cause.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

\s\ 12-4-92

Official Court Reporter Date

(3)

No. 94-981

Supreme Court, U.S.
FILED
FEB 2 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

O & G SPRING & WIRE FORMS SPECIALTY CO.,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether statistical evidence that gives rise to an inference of discrimination, is considered in conjunction with anecdotal evidence, and is not adequately rebutted, can support a finding of intentional discrimination in a disparate treatment case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether the evidence at trial was sufficient to support the district court's conclusion that respondent had proven intentional race discrimination.

3. Whether the district court abused its discretion by permitting the publication of a notice seeking to identify victims of petitioner's discrimination prior to fashioning a remedy.

4. Whether the Equal Employment Opportunity Commission's unsuccessful age discrimination claim against petitioner was "substantially justified" within the meaning of the Equal Access to Justice Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	11
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	14, 15
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	10
Bazemore v. *Friday*, 478 U.S. 385 (1986)	10
Chisholm v. *United States Postal Serv.*, 665 F.2d 483 (4th Cir. 1981)	13
EEOC v. *Chicago Miniature Lamp Works*, 947 F.2d 292 (7th Cir. 1991)	6, 9
EEOC v. *Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983), rev'd, 467 U.S. 867 (1984)	13
EEOC v. *Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988)	9
Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976)	10, 15
Hazelwood School District v. *United States*, 433 U.S. 299 (1977)	9, 11, 12
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)	5, 9, 11, 12, 13, 14
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	13
Pierce v. *Underwood*, 487 U.S. 552 (1988)	10, 15-16
Wards Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989)	5
Williams v. *United States*, 112 S. Ct. 1112 (1992)	14
Zobrest v. *Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993)	14, 15

Statutes: Page

Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* (1988 & Supp. V 1993) 2, 3
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* (1988 & Supp. V 1993) 2, 3
Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) 2, 8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-981

O & G SPRING & WIRE FORMS SPECIALTY CO.,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 38 F.3d 872. The December 14, 1988, opinion of the district court (Pet. App. 39a-56a) is reported at 705 F. Supp. 400. The May 22, 1989, opinion of the district court (Pet. App. 57a-59a) is reported at 52 Fair Empl. Prac. Cas. (BNA) 1685. The January 26, 1990, opinion of the district court (Pet. App. 60a-65a) is reported at 732 F. Supp. 72. The February 26, 1990, opinion of the district court (Pet. App. 66a-70a) is reported at 52 Fair Empl. Prac. Cas. (BNA) 1689. The March 20, 1992, opinion of the district court (Pet. App. 71a-78a) is reported at 790 F.

Supp. 776. The July 2, 1992, opinion of the district court (Pet. App. 79a-81a) is reported at 61 Fair Empl. Prac. Cas. (BNA) 1224. The August 19, 1992, final order of the district court (Pet. App. 82a-97a) is unreported. The November 23, 1992, ruling of the district court (Pet. App. 98a-102a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1994. The petition for a writ of certiorari was filed on November 30, 1994. A motion to clarify or amend petition for writ of certiorari was filed on January 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Equal Employment Opportunity Commission (EEOC) sued petitioner O & G Spring and Wire Forms Specialty Company (O&G) alleging that petitioner engaged in a pattern and practice of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (1988 & Supp. V 1993), and age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* (1988 & Supp. V 1993) (ADEA). Pet. App. 1a-2a. After a bench trial, the district court ruled in favor of the EEOC on the race discrimination claim and in favor of petitioner on the age discrimination claim. The district court denied petitioner's request for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) (EAJA), based on its conclusion that the EEOC's claim under the ADEA had been substantially justified within the meaning of EAJA. Pet. App. 99a-100a. The court of appeals affirmed.

1. Petitioner is a small company that manufactures wire springs and specialty forms. Pet. App. 1a. Approximately 35 of its employees work in the low-skilled "secondary department." *Ibid.* From 1979 to 1985, petitioner hired 87 persons for the secondary department—58 who applied by walking in off the street and 29 who were referred by word of mouth. Not one of the persons hired was black. *Ibid.*

On November 27, 1985, the EEOC filed suit against petitioner, alleging that petitioner was engaging in a pattern and practice of racial and age discrimination in recruiting and hiring in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the ADEA, 29 U.S.C. 621 *et seq.* Pet. App. 1a-2a. The relief sought included appropriate injunctive measures and back pay.

At the bench trial, the EEOC presented evidence that blacks constituted the largest group in the pool of persons who walked in looking for a job at O&G during the relevant time period of 1979 through 1985. The EEOC also submitted anecdotal evidence by four black persons that they had walked into O&G looking for a job, but had been rejected. Pet. App. 2a.

The EEOC also presented statistical evidence through expert testimony that, based on the 1980 census and EEO-1 reporting forms, 22.5% to 31.8% of the relevant labor market serving O&G was black.[1] Pet. App. 3a, 6a n.22. The EEOC's expert testified that these numbers probably underestimated black availability because the data only accounted for employed persons, whereas petitioner generally hired unemployed persons and blacks are overrepresented among the unemployed. *Id.*

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[1] Because petitioner's applicant records were incomplete, the EEOC could not rely on actual applicant flow data. Pet. App. 42a.

at 3a. Based on an availability range of 22.5% to 31.8%, the EEOC's expert calculated that the odds were "less than three in one million * * * that O&G would have hired no blacks into unskilled positions using a color-blind process." *Id.* at 46a.

Petitioner attempted to counter the EEOC's evidence by claiming that it hired no blacks for its secondary department from 1979-1985 because no blacks applied during its "hiring windows." Pet. App. 63a.[2] Petitioner also challenged the validity of the EEOC's statistical evidence, arguing that the statistics did not account for O&G's preference for hiring people with training or experience, or for the decision of individual blacks not to work in O&G's uncomfortable environment. *Id.* at 3a.

2. The district court bifurcated the liability issues from any remedy phase. In its initial opinion, the district court found O&G liable under Title VII on claims of both disparate treatment and disparate impact. Pet. App. 3a, 55a; see *id.* at 66a. The court recognized that statistical evidence is sufficient to establish liability under Title VII, *id.* at 53a-54a, but emphasized that an inference of discrimination based on statistics in a case such as this is "compelled not because Title VII requires a particular balance in an employer's work force or that the work force precisely 'mirror' the composition of the relevant labor market but rather because gross disparities between an employer's applicant flow, hiring or work force and its relevant labor market show the existence of discriminatory employment practices." *Id.* at 54a-55a,

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[2] Uncontroverted evidence showed that in the two years following the filing of this lawsuit, five of the 12 people hired by petitioner in the secondary department were black. Pet. App. 2a n.17. Petitioner offered a number of explanations for its sudden change in hiring patterns, all of which the EEOC disputed. *Ibid.*

citing *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-340 n.20 (1977). The court reasoned that, in order to rebut the EEOC's case, petitioner would have had to show that the EEOC's statistics were inaccurate or insignificant, or establish that there was a "non-discriminatory explanation for the discriminatory results." Pet. App. 52a.

The court gave some credence to O&G's explanations about certain immigrants being drawn to work at O&G because of the company founder's own immigrant background, other employees' use of the same foreign language, and willingness to work under poor conditions, as well as to O&G's preference for employees with technical backgrounds. Pet. App. 49a. The court also found, however, that in order for there to be any sort of reasonable statistical probability that no blacks would have been hired, the availability of blacks in the relevant labor market would have had to be significantly lower and petitioner failed to demonstrate that fact. It found that the EEOC's anecdotal evidence demonstrated that blacks applied before 1987 in substantial numbers. *Ibid.* The court concluded that petitioner's explanations did not explain away the "inexorable zero" number of blacks hired during the relevant period. *Id.* at 55a. The court ruled that the EEOC's proof was sufficient to establish a pattern and practice of racial discrimination in violation of Title VII from 1979 through 1985. *Ibid.*

The district court found that O&G was not liable under the ADEA. Pet. App. 3a, 56a.

On January 26, 1990, the district court revised its opinion in light of *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), and two Seventh Circuit cases

interpreting that opinion.[3] The court reversed its earlier finding that the EEOC had prevailed on its disparate impact claim based on O&G's word-of-mouth recruitment. Pet. App. 62a-63a. However, the district court reaffirmed its finding that the EEOC had prevailed on its disparate treatment claim based on O&G's walk-in hiring practices. Walk-in hiring accounted for two-thirds of O&G's hires from 1979 through 1987. *Id.* at 63a. The court noted that the statistical probability, using standard deviation analysis, of no blacks being hired through walk-in hiring from 1979 until the EEOC's claim was filed in 1985 was "infinitesimal." *Id.* at 64a. Pointing to the EEOC's statistical and anecdotal evidence and the dramatic change in petitioner's hiring practices after the EEOC's claim was filed, as well as to petitioner's failure to offer alternative statistics, the district court reaffirmed its original conclusion that petitioner engaged in a pattern and practice of disparate treatment of blacks in its hiring practices from 1979 through 1985.[4] *Id.* at 65a.

On February 26, 1990, the district court issued its first opinion in the remedy phase. Pet. App. 66a-70a.

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[3] On May 22, 1989, the district court had amended its initial opinion in response to petitioner's post-trial motion. The court clarified that it had imposed the burden of proof on the EEOC and had found that its evidence was strong enough to overcome petitioner's rebuttal evidence by a preponderance of the evidence as required under *Teamsters*. Pet. App. 57a-58a.

[4] On March 20, 1992, the district court again reconsidered its opinion in the liability phase in light of the Seventh Circuit's decision in *EEOC* v. *Chicago Miniature Lamp Works*, 947 F.2d 292 (1991). The district court concluded that the EEOC's statistical evidence remained sound following *Chicago Miniature*, and affirmed its previous finding of intentional race discrimination in the hiring of walk-in applicants. Pet. App. 71a-73a.

The court granted the EEOC leave to publish a notice in area newspapers in order to locate possible victims of O&G's discrimination. *Id.* at 66a. The court rejected O&G's argument that publication was premature. The court noted that the number of claimants was relevant to determining the method of any back pay distribution and was significant in considering whether O&G could financially support back pay. *Id.* at 67a-68a. The court held that the EEOC must show that the potential claimants applied for work at O&G or would have applied in the absence of discrimination. *Id.* at 68a.[5]

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[5] The court subsequently issued two opinions setting forth the bases for its determinations at the remedy phase concerning the degree of the black hiring shortfall during the relevant period (Pet. App. 74a-75a), back pay calculations (*id.* at 75a-76a, 79a-80a), pro rata distribution (*id.* at 76a, 79a-80a), prejudgment interest (*id.* at 76a-77a, 80a-81a), and hiring of discriminatees (*id.* at 77a). On August 19, 1992, the court also issued a final order granting relief. *Id.* at 82a-97a.

The district court was faced with 451 claimants following the publication of the notice. Pet. App. 76a. The court calculated that O&G had a hiring shortfall of 17 blacks. *Id.* at 75a. Because the jobs at issue required only "minimal qualifications," the district court reasoned that it would be impossible to determine which of the 451 claimants would have been hired for the 17 spots. *Id.* at 76a. Accordingly, the district court held that back pay should be distributed on a *pro rata* basis among eligible class members. *Ibid.*

The court's final order set forth a procedure for determining which claimants were class members entitled to back pay and/or consideration for employment by petitioner. Pet. App. 84a, 86a-87a. The procedure permitted review by O&G of all claimants' forms, *id.* at 86a-87a, and for judicial review of unresolved disputes between the EEOC and petitioner with regard to the eligibility of individual claimants. *Id.* at 87a.

The dissenting opinion in the court of appeals asserts that the EEOC "did not bother to clean out the seemingly fraudulent claims" and states that "[a]pparently in this case some claimants

At the conclusion of the case, petitioner moved for attorneys' fees and costs under EAJA, 28 U.S.C. 2412 (d)(1)(A), with regard to the EEOC's unsuccessful claim under the ADEA. Pet. App. 98a-102a. The EEOC argued that its claim was substantially justified in light of the three types of evidence indicating age discrimination—petitioner's admissions on two separate occasions that it sought to hire younger persons, testimony by three applicants over 45 years of age who were not hired, and statistical evidence presented by an expert witness. *Id.* at 99a. The district court reasoned that, even though it ultimately found the EEOC's statistical ADEA evidence unpersuasive, the fact that a respected labor economist had considered the evidence to be probative of age discrimination indicated that the EEOC's claim was not such that petitioner was entitled to fees against the EEOC under EAJA. *Id.* at 100a.

3. The court of appeals affirmed. Pet. App. 1a-21a. The court first rejected petitioner's claim that there was insufficient evidence to support the district court's finding that it engaged in a pattern and practice of

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were in prison during the period when they supposedly would have applied * * * [and] [o]thers held better and higher-paying jobs." *Id.* at 33a. Petitioner repeats some of these assertions. Pet. 12. There is no record evidence to support them. Petitioner's counsel first voiced these assertions during oral argument before the court of appeals. Following the argument, petitioner's counsel filed a motion seeking leave to file a letter of clarification and apology for "any possible perceived misstatement" at argument by counsel concerning the applicants in this case who responded as a result of publication. See Letter dated Nov. 5, 1993, at 1. Petitioner's counsel indicated that some of his remarks inadvertently referred to matters related to another case and matters outside the record and he asked the court not to consider such matters. *Id.* at 2.

discrimination. The court pointed out that petitioner's contentions that statistics alone cannot prove intentional discrimination had been "firmly rejected by the Supreme Court and this circuit." Pet. App. 4a, citing *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-340 n.20 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977); *EEOC* v. *Chicago Miniature Lamp Works*, 947 F.2d 292, 299 (7th Cir. 1991); *EEOC* v. *Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988).

The court emphasized that "[r]eliance on statistical evidence by no means diminishes the plaintiff's obligation to prove discriminatory intent—but in some cases, statistical disparities alone may prove intent." Pet. App. 5a. The court reviewed in detail the statistical evidence in this case and concluded that the district court thoroughly weighed all the objections raised by petitioner. It concluded that "even the use of the most forgiving variables could not reduce the calculation of African-Americans in the relevant labor market to a level that would account statistically for O&G's failure to hire any African-Americans." *Id.* at 9a. The court also noted that the district court did not rely exclusively on statistical evidence, but considered the EEOC's anecdotal evidence as well. The court of appeals ultimately was "led to the same conclusion as the Court in *Teamsters* that in any event, fine tuning of the statistics could not have obscured the glaring absence of minorities . . . . The company's inability to rebut the inference of discrimination comes not from a measure of statistics but from 'the inexorable zero.'" *Ibid.*, quoting *Teamsters*, 431 U.S. at 342 n.23.[6]

[6] The court of appeals also rejected petitioner's claim that it had been subjected to an erroneously high burden of proof. The

Turning to petitioner's challenges to the remedy, the court of appeals concluded that the district court did not abuse its wide discretion to fashion a Title VII remedy by seeking to determine the size of the class before proceeding to fashion the remedy. Pet. App. 11a, citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-421 (1975). The court also rejected petitioner's challenges to the back pay award. Pet. App. 12a-13a.

Finally, the court of appeals affirmed the district court's refusal to award petitioner attorneys' fees with regard to the EEOC's unsuccessful ADEA claim. The court of appeals ruled that EAJA applies to the ADEA. After reviewing the record evidence as a whole, the court of appeals refused to conclude that the district court had abused its discretion in finding that the EEOC was substantially justified in pursuing its ADEA claim. Pet. App. 13a-21a, citing, inter alia, *Pierce* v. *Underwood*, 487 U.S. 552, 565-566 (1988).

Judge Manion dissented. Pet. App. 22a-38a. He believed that the EEOC had not introduced sufficient evidence and criticized the EEOC's anecdotal and statistical evidence. *Id.* at 23a-31a. He also criticized the district court's decision to permit publication of notice before determining the scope of the remedy. *Id.* at 33a. He believed that O&G was entitled to fees under

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court reasoned that, regardless of the suggestions by the district court regarding intermediate burdens of production, the only question to answer after a full trial was whether the plaintiffs proved discrimination by a preponderance of the evidence. Pet. App. 10a, citing, inter alia, *Bazemore* v. *Friday*, 478 U.S. 385, 398 (1986). The court concluded that the district court did not err in concluding that the EEOC had proven its case against petitioner by a preponderance of the evidence. Pet. App. 11a.

EAJA based on his view that the EEOC's claim under the ADEA was not substantially justified. *Id.* at 34a.

ARGUMENT

1. Petitioner contends (Pet. 14-15, 20) that the court of appeals' decision conflicts with rulings by other courts of appeals, claiming that the court here held that the fact that the employer hired no blacks required a finding of intentional discrimination. Petitioner also asserts (Pet. 15, 17, 23) that the court of appeals' decision conflicts with decisions by this Court and other courts of appeals that have held that proof of a motive or intent to discriminate is required to support a disparate treatment claim under Title VII.

Petitioner mischaracterizes the court of appeals' ruling. The court acknowledged that the force of statistical evidence in a given case will depend on the strength of the statistics. Pet. App. 5a-6a ("strong statistics may prove a case on their own, while shaky statistics may be insufficient unless accompanied by additional evidence"). The court also emphasized that a plaintiff alleging disparate treatment must prove discriminatory intent and that "[r]eliance on statistical evidence by no means diminishes the plaintiff's obligation to prove discriminatory intent." *Id.* at 5a. The court also correctly relied on *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-340 n.20 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977), to hold that discriminatory intent may, in certain circumstances, be inferred from the existence of gross statistical disparities between the number of blacks that an employer actually hires and the number that it would be

expected to hire in the absence of discrimination. Pet. App. 5a.[7]

The cases cited by petitioner (Pet. 14, 15, 20 n.12) do not suggest that strong statistical evidence, standing alone, is always inadequate to prove intentional discrimination in a pattern or practice case. Nor do the cases suggest that, in a pattern and practice claim of disparate treatment such as this, where the court considered the statistical evidence in conjunction with anecdotal evidence, see Pet. App. 9a, a finding of

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[7] In *Teamsters*, this Court observed that proof of gross statistical disparities, standing alone, may be used to establish a prima facie case of racial discrimination in jury selection cases. 431 U.S. at 339. The Court then held that "[s]tatistics are equally competent in proving employment discrimination." *Ibid.* The Court explained:

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

Id. at 339-340 n.20. Recognizing that the disparate treatment theory under Title VII requires proof of a discriminatory intent, this Court added that "[i]n many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." *Ibid.* (citation omitted). The Court repeated this conclusion in *Hazelwood*. 433 U.S. at 307-308 ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

intentional discrimination is precluded. See, *e.g.*, *EEOC* v. *Federal Reserve Bank*, 698 F.2d 633, 645 (4th Cir. 1983) (acknowledging that statistics alone may sometimes prove intentional discrimination), rev'd on other grounds, 467 U.S. 867 (1984); *Chisholm* v. *United States Postal Serv.*, 665 F.2d 482, 494-495 n.17 (4th Cir. 1981) (same).

2. Petitioner argues (Pet. 18-23) that the evidence in this case was insufficient to support the district court's finding of intentional race discrimination. Petitioner asserts (Pet. 18-19) that the EEOC's statistical evidence failed to account for petitioner's legitimate business reasons. Petitioner contends (Pet. 21, 22-23) that the evidence did not meet the requirements under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), of establishing discrimination against individual witnesses and demonstrating that they were not rejected because of the absence of job vacancies.

With regard to petitioner's legitimate business reasons, the court of appeals found that the district court took those factors into account when evaluating the EEOC's statistics. Pet. App. 4a n.20. After accounting for the legitimate business reasons, the district court found the statistics to be probative of discrimination. *Id.* at 49a, 55a. This factual finding was not clearly erroneous.

With regard to petitioner's invocation of the requirements of *McDonnell Douglas*, petitioner cites the discussion of that case by this Court in *Teamsters*. See Pet. 21, citing *Teamsters*, 431 U.S. at 358 n.44. The Court there clearly stated, however, that the *McDonnell Douglas* decision "did not purport to create an inflexible formulation" and that proof of Title VII violations will vary in differing factual situations. 431 U.S. at 358. The Court pointed out that *McDonnell Douglas* involved an

individual complainant seeking to prove one instance of discrimination. 431 U.S. at 358 n.44. The instant case, however, involves a pattern and practice claim. The *Teamsters* Court expressly held that, in such cases, means other than proof at the liability phase that each person for whom relief is sought was an individual victim, are appropriate to meet a Title VII plaintiff's burden of proof. 431 U.S. at 359-360 & n.45.

3. Petitioner includes (Pet. i) in its questions presented the issue whether the district court could properly require an employer to publish a notice to prospective victims. Petitioner, however, does not raise any legal arguments with regard to this issue in the body of its petition for certiorari. The question is therefore not presented by the petition. See *Williams* v. *United States*, 112 S. Ct. 1112, 1122 (1992) (issue must be "clearly presented" in petition for certiorari).

Petitioner has filed a motion to clarify or amend its petition for writ of certiorari in which it seeks to raise the publication issue. Petitioner did not, however, argue on appeal that the publication was unlawful or an abuse of discretion and did not seek reversal or remand with regard to the publication of notice issue. See Pet. App. 11a. Petitioner only challenged the publication of the class notice because it "might reach too broadly and would generate too many false claims to entitlement to relief" and sought reimbursement of the expenses of the publication. *Ibid.* Petitioner's challenge to the lawfulness of the notice publication was therefore waived. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). In any event, petitioner's argument lacks merit because the

district court did not exceed its "wide discretion" in determining the proper remedy in a Title VII case merely because it permitted publication of notice before, rather than after, determination of the scope of the remedy. See Pet. App. 11a (citing *Franks*, 424 U.S. at 763).[8]

4. Petitioner contends (Pet. 15, 24-27) that the Court should review its claim to attorneys' fees with regard to the EEOC's bringing of the ADEA claim so that the Court can correctly apply EAJA's "substantial justification" standard to this case. The decision of the court of appeals, however, is fully consistent with the standards that this Court established in *Pierce*, 487 U.S. at 565-566 & n.2. The Court there held that "a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at

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[8] Petitioner also argues in a footnote (Pet. 21 n.14) that the district court's remedy phase did not follow the *Teamsters* provision that an employer be allowed an opportunity to contest each claimant's eligibility, and that, in any event, such a procedure is impractical for a small employer as a financial matter.

Petitioner ignores the fact that the district court established a procedure for petitioner to challenge each individual claimant's entitlement to relief at the remedy phase. See Pet. App. 84a-87a. The fact that petitioner did not take advantage of that opportunity, see Pet. App. 33a, does not establish that the procedure was inadequate, and petitioner's attempt now to explain why it did not challenge any of the claimants, Pet. 21-22 n.14, is not appropriate. To the extent petitioner's argument could be construed as a claim that class-wide relief was inappropriate in this case because petitioner is a small employer, petitioner waived such a claim because it never argued to the court of appeals that class-wide relief was improper. See *Zobrest*, 113 S. Ct. at 2466, quoting *Adickes*, 398 U.S. at 147 n.2.

566 n.2. The Court further held that a district court's decision on substantial justification should not be reversed unless the record "commands the conclusion" that the district court abused its discretion. *Id.* at 559, 570.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1995

Supreme Court, U.S.
FILED
FEB 17 1995
OFFICE OF THE CLERK

No. 94-981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

O & G SPRING AND WIRE FORMS SPECIALTY COMPANY

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respondent.

PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Reply	1
Appendix A Section of Appellant's Brief to Seventh Circuit Preserving Mandamus Question on Remedy and Incorporating Same into Appellant's Brief	Ap. A

TABLE OF AUTHORITIES

Cases:

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	4
McDonnell-Douglas v. Green, 411 U.S. 792 (1973)	4

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In reply Petitioner O&G will address misstatements in the government's opening statement in its Opposition and also respond to certain arguments suggested in the government's Opposition.

Contrary to the EEOC at page 3 of its Opposition blacks did not constitute the largest group in the pool of persons who walked in looking for a job. In fact, there were hardly any blacks in the applicant pool. Blacks were the largest group that did come to O&G and presented themselves on the second floor where applications are taken but did not ask for applications, but rather only asked to have their welfare and unemployment records verified that they were looking for a job.

The record evidence is uncontroverted that O&G hands out applications to whoever asks for one, regardless of whether it is hiring and this is per the testimony at trial of Lydia Guiterrez found in the trial transcripts pages 171 to 173 and pages 213 to 214 and by Ms. Ross at pages 1840 to 1843. O&G consistently followed this practice for clerical and secretarial employees to

state to applicants that even if they were not hiring, they were welcome to fill out an application.[1] Thus it is a misstatement to suggest that "blacks constituted the largest portion of the pool".

Similarly, there is no anecdotal evidence that blacks actually applied. The black witnesses who testified at trial all applied for jobs at times when there were no job vacancies.[2] As Judge Manion points out in dissent, there is no question in the record that there were no openings at the time these black's applied.

The hiring periods of the employer as set forth in our Petition rather than the perjoritive "hiring windows" as used in the Opposition were created for a justifiable business reason and no finding of discrimination for such hiring periods was found by any court. The EEOC used a second expert, Dr. Farrell Bloch, their expert on rebuttal, who testified with respect to the hiring periods used by O&G prior to making a hiring decision and found them to be non-discriminatory. This admission against interest coupled with the failure of any finding of discrimination based on the hiring periods should lay to rest that the hiring periods were anything other than a justifiable business purpose utilized by a small employer that had no personnel department. The "hiring period" included only looking at applications filed in the two weeks preceding the commencement of the interview process. The stale nature of the applications prior to two weeks, was as a result of the business decision of O&G that applications only have limited vitality. Beyond that period of time applicants would have changed their address or already have found a job for these slightly above minimum wage jobs.

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[1]O&G did, in fact, retain applications from 1984, 1985 forward as per the testimony of Ms. Guiterrez at Tr. 221. There was no evidence or any finding in any court that the company in any way tampered with the applications or refused applications from blacks.

[2]The authority for this claim in the Opposition is a reference to Petitioner's Appendix, page 2 referring to the decision of the Seventh Circuit which in footnote 19 adopts the reference of the District Court Judge who erroneously refers to "anecdotal evidence" without stating at 732 F.Supp. 72 at 75 what that evidence is. In Judge Leinenweber's initial decision Pet. Ap. 39(a) the only reference to anecdotal evidence is to the three black's who testified at trial, but applied at times when there was no vacancy.

The EEOC focuses on the dramatic change "in petitioner's" hiring practices after the EEOC's claim was filed. This is, in fact, a total misstatement of the record. Hiring practices followed by O&G after complaint was filed were exactly the same. O&G continued to require prior spring company experience or technical training. It continued to follow the use of hiring periods, it continued to personally interview every single employee that was hired. The only changes that occurred were external to O&G. There was a change in the nature of the neighborhood. It had been a largely Polish neighborhood. There was a newly used parking lot across the street from O&G. That parking lot was utilized largely by blacks in the neighborhood who were visiting a flea market down the street and O&G had three garage doors immediately across the street from the parking lot that were open year around, so for the first time person's could see that there was a factory there. O&G attributes the increased applicant flow after issuance of complaint to that parking lot and the changing neighborhood and third the reindustrialization of an area in which many persons lost their jobs and were now looking for work.

An examination of the period after the filing of the Complaint showed that applicant flow increased for all candidates, blacks and whites and the blacks identical to the whites that were hired in the period subsequent to issuance of complaint, in fact, met the same hiring requirements of prior Spring Company experience and prior technical training. The "hiring periods" continued to be utilized, so there was clearly no change in O&G's practices.

In the argument portion of its Opposition, the government continues to argue that the District Court and the Appellate Court considered statistical evidence in conjunction with anecdotal evidence. We submit that persons merely applying for a job at times when there is no opening does not constitute anecdotal evidence exhibiting discrimination based upon race. We would consider the kind of anecdotal evidence required to supplement statistics to be evidence from which racially discriminatory conduct can be inferred, a factor, totally absent in this case.

In addressing Petitioner's legitimate business reasons the Opposition at page 13 suggests as did the Court of Appeals that these

were "factors" taken into account by the District Court when evaluating the statistics (see Opposition, page 13). It is respectfully suggested that the Court make a close examination of the decision of the District Court. The District Court's decision is woefully inadequate. It talks about taking factors into account without referencing what they are or how they were taken into account, and makes no findings at all that are helpful in this regard. Surprisingly, the Court of Appeals majority falls right in line with this vagueness in affirming the District Court.

At page 13 and 14 of the Opposition, the government takes Petitioner to task for mischaracterizing the decision of *Teamsters* (*Teamsters v. U.S.*, 431 U.S. 324 (1977)) reading of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); even if the government is correct in its analysis on this limited point, there can be no question that the *Teamster's* Court specifically had reference to 40 separate instances or anecdotal examples of discrimination which in *Teamster's* clearly referred to separate instances of racial discrimination not simply blacks applying when there were no openings.

On the question of the publication of notices to victims, the EEOC argues the Petitioner did not properly raise this below and therefore is precluded from raising it here. This is not correct. Petitioner in its Appellant's Brief to the Seventh Circuit from page 46, 47 and 48 which are reproduced herein as an Appendix A specifically argued this issue. And at footnote 28 Appendix A specifically incorporated by reference into its Seventh Circuit argument O&G's Petition for Writ of Mandamus and Prohibition to this Court in No. 90-2209. Additionally in its Motion for clarification, Petitioner asks the Court to consider and incorporate by reference as part of Petitioner's argument, the dissenting opinion of U.S. Court of Appeals Judge Manion, insofar as he addresses this issue.

Finally in footnote 8 of the Opposition it is argued at page 15 that Petitioner waived its challenge to the hearing procedure on the remedy issue. In fact Judge Leinenweber did not permit Petitioner to conduct individual hearings even though it was pointed

out to the Judge that the Social Security search of the records of the applicants demonstrated the hiring history they filled out in their application with O&G were totally at odds with their work record under Social Security. It would have been prohibitive in terms of expense for a small employer to engage in 400 additional hearings to challenge the validity of the process. We respectfully submit that the issue has not been waived and rather has been preserved through the mandamus petition and our efforts to incorporate that by reference at the Court of Appeals level and to raise the issue once again before this Court.

With respect to the substantial justification question raised under EAJA, Petitioner respectfully states that, whatever basis the government may have had in initiating the ADEA claim in the first instance, once it went through the discovery phase, and found the large number of persons over age 40 that O&G hired as a matter of routine practice, and they nevertheless proceeded to trial, demonstrates that there could be no substantial justification for the EEOC to have gone forward with the trial. There could not be a stronger case for awarding fees under EAJA.

For all the aforesaid reasons and principally the reasons set forth in its petition, we pray that the Court accepts this case for review.

Respectfully submitted,

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Dated: February 16, 1995

APPENDIX A

(FROM APPELLANT'S BRIEF IN THE 7th CIRCUIT COURT OF APPEALS
Cause No. 92-3436; Filed April 13, 1993)

III. THE DISTRICT COURT IMPROPERLY REQUIRED THE APPELLANT TO ADVERTISE CLASS NOTICES PREMATURELY AND USED INAPPOSITE HIRING DATA IN FASHIONING A REMEDY[3]

A. CLASS NOTIFICATION IMPROPERLY PRECEDED DETERMINATION OF THE SIZE AND CHARACTERISTICS OF THE CLASS AND OF THE REMEDY

On February 26, 1990, Judge Leinenweber ordered that notice be published in four Chicago mass-market publications (the *Chicago Tribune*, the *Chicago Sun-Times*, the *Chicago Defender* and *Chicago TV Guide*) to an unidentified class of black job applicants and potential job applicants allegedly discriminated against by O&G. The form of the notice invited blacks who were looking for kick and press work in the "surrounding area" near O&G to secure a claim form from the EEOC. O&G objected to the EEOC's notice of publication because the district court had not yet determined what the appropriate remedy would be for the disparate treatment claim, had never made the preliminary determination of what percentage of O&G's hiring decisions should have gone to blacks, what percentage of blacks in the relevant labor market possessed the skills needed by O&G, and what financial award O&G could assume without putting it out of business.

The publication of notice before the preliminary finding of an appropriate remedy appears to be without precedent and makes

[3]O&G's Petition For Writ of Mandamus and Prohibition in this court (No. 90-2209) has been made part of the record in this case. The issues discussed in this section were fully briefed in those proceedings, and O&G respectfully draws this court's attention to the fuller exposition of these arguments therein.

little sense. In *EEOC v. Riss International Corp.*, 525 F. Supp. 1094 (W.D.Mo. 1981), *EEOC v. Cook Paint & Varnish Co.*, 35 F.E.P. Cases 43. Mo. 1981) and *Chicago Miniature* (district court) *supra*, publication was ordered only after determination of the remedy. Unless the shape of the remedy would change as a result of notification, publication before remedy determination is premature. (There is no indication that Judge Leinenweber contemplated changing the amount of money due: "The amount of people will not necessarily increase the amount of money your client owes, if I rule that way." [February 20, 1990 Tr. at 7.])

The hypothetical victims. Essentially, publication is tantamount to a search for victims— ironic, in that this case is notable for its ascription of liability to O&G without the identification of a single "victim" at trial. (*See* discussion of EEOC's witnesses, *supra.*) It is disproportionate in the extreme to take a measure sure to surface a large number of claimants when, with all the resources available to the EEOC at trial, it was unable to produce a single individual victim of discrimination.

An invitation to mischief. The blunderbuss notice O&G was required to publish unfortunately constituted an open invitation to commit fraud on the court. With permission of the court, O&G researched the Social Security records of a large percentage of the claimants. The results were startling: several glaring inconsistencies existed between experience information provided on the claim forms and documented information in the claimants' Social Security records. (*See* Record O&G's Motions dated 7/3/91.)

Inappropriate claimants. The district court allowed no attempt to separate wheat from chaff among the claimants, permitting no inquiry into whether they had in fact applied when O&G was hiring or whether they possessed desired backgrounds— in short, whether they would in fact have been hired absent discrimination on O&G's part.

Despite the above abuses, the district court refused to examine the qualifications of individual claims, lumping them all into a homogeneous pool of equal merit for the purpose of dividing up O&G's payment.

The effect was to turn a make-whole remedy into a punitive exercise against O&G, with O&G incurring substantial business and financial burdens before this court had the opportunity to review the district court's decision.

O&G does not seek a remand of this case. If this court affirms the district court, O&G suggests, as a responsible corporate citizen, that this court should nevertheless examine the propriety of ordering class notification before determination of key elements of the remedy; prudence should dictate waiting until an appellate court has spoken before undertaking mass notification. If O&G prevails in this appeal, it seeks its out-of-pocket expenses associated with the remedy phase and attorneys' fees, including fees for the mandamus action.